TRANSCRIPT OF RECORD

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1915.

No. 335.

SPOKANE & INLAND EMPIRE RAILROAD COMPANY, PLAINTIFF IN ERROR,

vs.

EDGAR E. CAMPBELL.

IN ERROR TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE NINTH CIRCUIT.

FILED JANUARY 13, 1916.

(24,516)

(24,516)

SUPREME COURT OF THE UNITED STATES.

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No. 325.

SPOKANE & INLAND EMPIRE RAILROAD COMPANY, PLAINTIFF IN ERROR,

vs.

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IN ERROR TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE NINTH CIRCUIT.

INDEX.

JUDD & DETWEILER (INC.), PRINTERS, WASHINGTON, D. C., SEPTEMBER 23, 1915.

United States Circuit Court of Appeals for the Ninth Circuit.

No. 2366.

SPOKANE & INLAND EMPIRE RAILROAD COMPANY, a Corporation, Plaintiff in Error,

vs.

EDGAR E. CAMPBELL, Defendant in Error.

TRANSCRIPT OF RECORD.

Upon Writ of Error to the United States District Court for the Eastern District of Washington, Northern Division.

Names and Addresses of Attorneys of Record.

Graves, Kizer & Graves, Old National Bank Building, Spokane, Washington, Attorneys for Plaintiff in Error.

Belden & Losey, Old National Bank Building, Spokane, Washington, and

H. L. Maury, of Butte, Montana, Attorneys for Defendant in Error.

In the District Court of the United States for the Eastern District of Washington, Northern Division.

EDGAR E. CAMPBELL, Plaintiff,

vs.

SPOKANE & INLAND ELECTRIC RAILROAD CO., a Corporation, Defendant.

Third Amended Complaint.

Plaintiff complains of the defendant and for third amended complaint herein, alleges:

1. That the defendant is a corporation organized and existing under and by virtue of the laws of the State of Washington, and as such corporation is doing business in its corporate name of Spokane & Inland Electric Railroad Co., and was thus engaged on or about the 31st day of July, 1909, in its said business as a carrier of interstate commerce and carrier of passengers and freight between the City of Spokane, Washington, and the Town of Cœur d'Alene, Idaho.

2. That on or about the said 31st day of July, 1909, the plaintiff herein was employed by said defendant in the capacity of motorman, and as such employee was operating and running electric train known as Special No. 5 from the Town of Cœur d'Alene to the City of Spokane, State of Washington.

3. That said defendant, through its agents, officers and employees,

so carelessly and negligently managed and operated its said trains that said defendant's officers, agents and employees caused improper running orders to be given to this plaintiff on said date, which said improper orders caused the accident and injuries hereinafter complained of.

4. That plaintiff on said date aforesaid was directed by the agents, officers and employees of said defendant to take his said train No. 5, and to proceed from said Town of Cœur d'Alene to the City of Spokane, and that plaintiff was given orders, directing him to meet and pass Regular Train No. 20 at the Town of Allen; that when rounding a curve and nearing the station of Gibbs, State of Idaho, which is a point between Cœur d'Alene City, Idaho, and the Town of Allen, this plaintiff saw a train coming from the opposite direction and running on the same track upon which said plaintiff's train was running, which said train plaintiff is now informed and believes was Regular Train No. 20.

5. That upon the coming into view of said train No. 20,
3 plaintiff used all due diligence to bring his motor upon said train No. 5 to a stop and standstill; that he duly applied the air brakes upon said motor, but owing to the defective condition of said air brakes, which said condition was wholly unknown to plaintiff, said brakes wholly failed and refused to act, and plaintiff's said train continued to rush forward at a tremendous rate of speed and a collision occurred, plaintiff's said train colliding with said Train No. 20, and which said collision caused the injuries hereinafter complained of.

6. That said accident and collision was directly due to the wrongful and negligent acts of the plaintiff's said superiors in the giving of said wrongful orders, and in their failure to furnish this plaintiff with a motor and train supplied with proper air-brakes in working condition.

7. That this plaintiff, after observing said train No. 20 upon the track, had plenty of time to have stopped his said train and prevented said collision if said air-brakes had been in good condition and in proper working order.

8. That by reason of said collision of said trains, aforesaid, said plaintiff was hurt, maimed and injured, so that he was unconscious for many days thereafter; that plaintiff was bruised, cut and injured both externally and internally; that both of his legs were broken by reason of which injury plaintiff's left leg is now six inches shorter than its normal condition and his right leg is three inches shorter
than its normal condition; that plaintiff has entirely lost the
4 hearing in his right ear, and he is crippled for life to such an extent as to greatly hinder and impair his capacity for earning his livelihood; that plaintiff has, besides said injuries above set forth, undergone intolerable suffering and great pain of body and mind and will continue to suffer great pain of body and mind during the remainder of his life; that he will never again be able to earn his living without the assistance of others; that prior to the injuries herein complained of, plaintiff was a healthy, strong and able-bodied man, and at the time of said injuries was thirty-nine years of age and

vas capable of earning, and did earn, on an average of $6.00 per lay; that all of the negligent acts and things herein complained of gainst said defendant directly contributed to said plaintiff's in- uries above mentioned, and all without fault or negligence on the art of this plaintiff, and that by reason of said wrongs and injuries foresaid plaintiff has been damaged in the very great sum of 50,000.00.

Wherefore, Plaintiff prays for judgment against said defendant or the sum of $50,000.00, together with plaintiff's costs and disburse- nents herein expended.

(Signed) BELDEN & LOSEY,
Attorneys for Plaintiff.

TATE OF WASHINGTON,
County of Spokane, ss:

Edgar E. Campbell, being first duly sworn, on oath deposes and says: That he is the plaintiff in the above entitled action; that he has read the above and foregoing third amended com- plaint, knows the contents thereof, and that the same is true s he verily believes.

(Signed) EDGAR E. CAMPBELL.

Subscribed and sworn to before me this 6th day of June, A. D. 912.

[SEAL.] (Signed) W. C. LOSEY,
Notary Public for the State of Washington, Residing at Spokane.

Endorsements: Due service of the within Third Amended Com- laint, by a true copy thereof, is hereby admitted at Spokane, Wash- ngton, this 8th day of June, 1912. (Signed) Graves, Kizer & raves, Attorneys for Defendant. Third Amended Complaint. iled in the U. S. District Court for the Eastern District of Washing- n, June 15, 1912. W. H. Hare, Clerk. By Frank C. Nash, eputy.

the District Court of the United States for the Eastern District of Washington, Northern Division.

EDGAR E. CAMPBELL, Plaintiff,
vs.
SPOKANE & INLAND EMPIRE RAILROAD COMPANY, Defendant.

Answer.

For answer to plaintiff's third amended complaint defendant:

I.

Admits each and every allegation made and contained in para- aphs one and two thereof.

II.

Denies each and every allegation made and contained in paragraph three thereof.

III.

Admits that at the time referred to in the fourth paragraph thereof, plaintiff acting as a motorman upon one of defendant's trains was proceeding with his train from Cœur d'Alene to Spokane; admits that at the Station of Gibbs, a point between Cœur d'Alene and Allan, regular train No. 20 on defendant's road came in view of plaintiff's train; admits that said train was coming from the opposite direction and running on the same track upon which plaintiff's train was running; denies each and every other allegation made and contained in the fourth paragraph thereof.

IV.

Admits that after plaintiff's train came in view of train No. 20 plaintiff's train continued to rush forward at a tremendous rate of speed, and that plaintiff's train collided with train No. 20, and admits that through such collision plaintiff was to some extent injured; denies each and every other allegation made and contained in the fifth paragraph thereof.

V.

Denies each and every allegation made and contained in the sixth paragraph thereof.

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VI.

Denies any knowledge or information sufficient to form a belief as to whether plaintiff observed train No. 20 before coming in collision with it; admits that there was plenty of time for him to have stopped his train and prevented the collision with No. 20 after he might have observed train No. 20; denies each and every other allegation made and contained in the seventh paragraph thereof.

VII.

Admits that by reason of the collision of the trains plaintiff was injured; admits that both of his legs were broken in the collision; admits that prior to the time of the injury he was a healthy, strong and able-bodied man; denies any knowledge or information sufficient to form a belief as to the extent of his injuries other than the breaking of his legs; and denies each and every other allegation contained in the eighth paragraph thereof, and particularly denies that plaintiff was damaged in the sum of fifty thousand ($50,000) dollars, or in any other sum, or at all, by reason of the matters and things alleged in the complaint.

Further answering, and for an affirmative defense to said complaint defendant alleges:

I.

That upon July 31, 1909, and for several years prior thereto defendant owned and operated a line of electric railway between
8 Cœur d'Alene, Idaho, and Spokane, Washington; that over its road a number of regular trains were operated by a time-table, in accordance with the printed rules and regulations of the company, and special trains were also run thereover in accordance with such rules and regulations, and under telegraphic orders given by train dispatchers to the train operators; that upon the date aforesaid, and for several years prior thereto, plaintiff was and had been a motorman employed by plaintiff and regularly engaged in the operation of its trains, and that he then was thoroughly conversant with the manner of the operation of its road, with its rules and regulations, and with the duties required of its operatives.

II.

That on said July 31st plaintiff was acting as motorman upon a special train referred to and described in the orders of defendant as Motor 5. That under the rules and regulations of such company such special train had no rights over the regular trains operating under the time table of defendant, and was obliged to keep out of the way of such regular trains; that such special train had no right to go out upon the road when a regular train was due, unless it had telegraphic orders from defendant's train dispatcher in Spokane ordering it to do so; that upon said date plaintiff, in charge as motorman of the special train aforesaid, was standing in defendant's yards at Cœur d'Alene ready to start upon a run to Spokane as soon
9 as there should arrive at Cœur d'Alene one of defendant's regular trains, known on its time table as No. 20, which was then due; that defendant, knowing that No. 20 was then due and that he had no right to leave Cœur d'Alene until it had come in, received telegraphic orders from the dispatcher at Spokane to meet another special train at the town of Allan, and that when handing him such orders the conductor of plaintiff's train told him he might run farther down in the yards and wait there until No. 20 came in; that plaintiff started his train under such orders, but instead of stopping at the point in the yards where he had been directed to stop, continued on his way towards Spokane, passing out of the Cœur d'Alene yards and out on the line to Spokane, and at the Station of Gibbs, a distance of about one and one-half miles from Cœur d'Alene, his train came in collision with No. 20 on a straight track; that No. 20 was in full view of plaintiff's train for a distance of more than eight hundred feet before the collision occurred, and the motorman of No. 20, seeing plaintiff's train approaching, came to a full stop; that plaintiff could, if he had seen No. 20, have brought his train to a stop within a distance of 150 to 200 feet, and that the collision between the two trains was caused solely and entirely by plaintiff's disobedience of the rules, regulations and orders of the company, and by

his reckless conduct in failing to pay heed to his surroundings, and to keep a lookout upon the track ahead of him so as to observe No. 20 and bring his train to a stop, as he might have done had he have looked ahead of him at all.

Further answering and by way of cross-complaint defendant alleges:

I.

That upon July 31, 1909, and for several years prior thereto defendant owned and operated a line of electric railway between Cœur d'Alene, Idaho, and Spokane, Washington; that over its road a number of regular trains were operated by a time-table, in accordance with the printed rules and regulations of the company, and special trains were also run thereover in accordance with such rules and regulations, and under telegraphic orders given by train dispatchers to the train operators; that upon the date aforesaid, and for several years prior thereto, plaintiff was and had been a motorman employed by plaintiff and regularly engaged in the operation of its trains, and that he then was thoroughly conversant with the manner of the operation of its road, with the rules and regulations, and with the duties required of its operatives.

II.

That on said July 31st plaintiff was acting as motorman upon a special train referred to and described in the orders of defendant as Motor 5. That under the rules and regulations of such company such special train had no rights over the regular trains operating under the time table of defendant, and was obliged to keep out of the way of such regular trains; that such special train had no right to go out upon the road when a regular train was due, unless it had telegraphic orders from defendant's train dispatcher in Spokane ordering it to do so; that upon said date plaintiff, in charge as motorman of the special train aforesaid, was standing in defendant's yards at Cœur d'Alene ready to start upon a run to Spokane as soon as there should arrive at Cœur d'Alene one of defendant's regular trains, known on its time table as No. 20, which was then due; that defendant, knowing that No. 20 was then due and that he had no right to leave Cœur d'Alene until it had come in, received telegraphic orders from the dispatcher at Spokane to meet another special train at the town of Allan, and that when handing him such orders the conductor of plaintiff's train told him he might run farther down in the yards and wait there until No. 20 came in; that plaintiff started his train under such orders, but instead of stopping at the point in the yards where he had been directed to stop, continued on his way towards Spokane, passing out of the Cœur d'Alene yards and out on the line to Spokane, and at the Station of Gibbs, a distance of about one and one-half miles from Cœur d'Alene, his train came in collision with No. 20 on a straight track; that No. 20 was in full view of plaintiff's train for a distance of more than eight

hundred feet before the collision occurred, and the motorman
2 of No. 20, seeing plaintiff's train approaching, came to a full stop; that plaintiff could, if he had seen No. 20, have brought is train to a stop within a distance of 150 to 200 feet, and that the ollision between the two trains was caused solely and entirely by laintiff's disobedience of the rules, regulations and orders of the ompany, and by his reckless conduct in failing to pay heed to his irroundings, and to keep a lookout upon the track ahead of him so s to observe No. 20 and bring his train to a stop, as he might have one had he have looked ahead of him at all.

III.

That in such collision eighteen persons who were passengers upon he train of which plaintiff was motorman *was* killed, and a very reat number were seriously inj ed, many of them being maimed nd disfigured for life; that defendant was utterly without defense to he claims that were made against it on account of the deaths and in- uries aforesaid for the reason that all the killed and injured persons vere passengers upon its train to whom it owed the duty, by itself nd of its employes, to exercise the highest degree of care and caution o protect them from injury, and the killing and injuring of these assengers was caused solely and entirely by plaintiff's wanton negli- gence for which the defendant was in law responsible. Being with- out defense to the claims made upon it, *plaintiff* paid out in settle-
ments to the injured persons or to the survivors of those who
13 were killed, $320,000, and judgments to the amount of $25,000 were rendered against it in suits brought by survivors f passengers upon the train which plaintiff was operating, and be- ause of the facts aforesaid and plaintiff's wanton negligence, defend- nt has been damaged in the sum of $345,000.

Wherefore, defendant prays as to plaintiff's action against it that it be dismissed and go hence without day, and that it recover judg- ment against plaintiff in the sum of three hundred forty-five thou- sand ($345,000) dollars by reason of the damages sustained through his negligence.

(Signed) GRAVES, KIZER & GRAVES,
Attorneys for Defendant.

STATE OF WASHINGTON,
County of Spokane, ss:

W. G. Davidson, being first duly sworn, on his oath states: That he is one of the officers of the within named defendant Spokane & Inland Empire Railroad Company, to-wit; its secretary, and that he makes this verification for and on its behalf; that he has read the foregoing answer, knows the contents thereof, and believes the same to be true.

(Signed) W. G. DAVIDSON.

Subscribed and sworn to before me this 4th day of November, 1912.

(Signed) W. J. MATTHEWS,
Notary Public in and for the State of Washington, Residing at Spokane.

14 Endorsements: Service of the within Answer is hereby acknowledged this 5th day of November, 1912. (Signed) Belden & Losey, Attorneys for Plaintiff. Answer to Third Amended Complaint. Filed in the U. S. District Court for the Eastern District of Washington, November 9, 1912. W. H. Hare, Clerk, By Frank C. Nash, Deputy.

In the District Court of the United States for the Eastern District of Washington, Northern Division.

EDGAR E. CAMPBELL, Plaintiff,
vs.
SPOKANE & INLAND EMPIRE RAILROAD COMPANY, Defendant.

Reply.

Plaintiff for reply to defendant's answer herein, admits, alleges and denies as follows:

1. Plaintiff for reply to paragraph 1 of defendant's affirmative defense, admits that on July 31, 1909, and for several years prior thereto defendant owned and operated a line of electric railway between Cœur d'Alene, Idaho, and Spokane, Washington; that over its road a number of regular trains were operated, and special
15 trains run over said road, and that upon July 31, 1909, and for several years prior thereto, plaintiff was, and had been, a motorman employed by *plaintiff*, and regularly engaged in the operation of its trains, but denies each and every other allegation, matter and thing contained in paragraph 1 of defendant's affirmative defense.

2. For reply to paragraph 2 of said affirmative defense, plaintiff admits that on July 31st, 1909, plaintiff was acting as motorman upon a special train referred to and described in the orders of defendant as Motor 5; that upon said date plaintiff was in charge as motorman of said special train mentioned in said paragraph, and that same was standing in defendant's yards at Cœur d'Alene ready to start upon a run to Spokane, and that plaintiff was given orders to start upon his run to Spokane by the officers of the defendant, and that at the station of Gibbs, a distance of about one and one-half miles from Cœur d'Alene, his train came in collision with train No. 20 on a straight track; that No. 20 was in full view of plaintiff's train for a distance of about 800 feet before the collision occurred, and that the motorman on No. 20, seeing plaintiff's train approaching, came to a full stop, but denies each and every other allegation, matter and thing contained in paragraph 2 of said affirmative defense.

The plaintiff for answer to the defendant's cross-complaint herein, admits, denies and alleges, as follows:

1. For answer to paragraph 1 of defendant's cross-complaint, plaintiff admits that on July 31, 1909, and for several rs prior thereto, defendant owned and operated a line of electric lway between Cœur d'Alene, Idaho, and Spokane, Washington; t over its road a number of regular trains were operated by a e-table, and that upon said date and for several years prior thereto, intiff was, and had been, a motorman employed by *plaintiff* and ularly engaged in the operation of its trains, and admits that he s familiar with the printed rules and regulations of said defend-, but denies each and every other allegation, matter and thing tained in said paragraph 1 of said cross-complaint.

2. For answer to paragraph 2 of said cross-complaint, plaintiff nits that on July 31, 1909, he was acting as motorman upon a cial train known as Motor 5; that upon said date plaintiff, in rge as motorman of the special train aforesaid, was standing in endant's yards at Cœur d'Alene ready to start upon his run to kane, and that plaintiff started his train from said yards, and in-ad of stopping at a point in the yards of said defendant, continued train on his way towards Spokane, passing out of the Cœur lene yards and out on the line towards Spokane, and at the sta-n of Gibbs, a distance of about one and one-half miles from Cœur lene, his train came in collision with Train No. 20 on a straight track; that No. 20 was in full view of plaintiff's train for a distance of about 800 feet before the collision occurred, and the motorman of No. 20, seeing plaintiff's train approaching, ne to a full stop, but denies each and every other allegation, matter d thing contained in said paragraph 2 of said cross-complaint.

3. For answer to paragraph 3 of said cross-complaint, plaintiff mits, that in such collision eighteen persons, who were passengers on the train on which plaintiff was motorman, were killed and a y great number were seriously injured, many of them being imed and disfigured for life, and that defendant owed a duty to d passengers, by itself and its employes, to exercise the highest gree of care and caution to protect them from injury; that as to e amount of money paid by the defendant, because of said injuries, intiff has no knowledge or information sufficient to form a belief, d therefore denies same, and further denies each and every other egation, matter and thing in said paragraph contained.

Further answering and for an affirmative defense to said counter-im, plaintiff alleges:

1. That on the 31st day of July, 1909, the plaintiff herein was, d for a long time prior thereto had been, employed by the defend-t in the capacity of motorman, and as such employe was operating d running the different trains of the defendant, operating between e City of Spokane and the Town of Cœur d'Alene, and on the date and at the time hereinafter complained of, plaintiff was operating Special Train No. 5 between the stations above named; that on said date said Motor 5 was furnished the intiff with which to make said run, and plaintiff at the time of

the accident, hereinafter complained of, was operating said moto
that on said date plaintiff ordered and directed by the defendant
operate said train and motor from Cœur d'Alene to the City
Spokane, and while the plaintiff so operated said train, without faul
or negligence upon plaintiff's part, at a point on the line of said rai
way, near the Town of Gibbs, in the State of Idaho, came in conta
with Train No. 20 on the main line of said defendant's track; th
plaintiff prior to the time of said collision saw said train No. 2
after rounding a curve near said station, in ample time to ha
stopped his said train before colliding with said train No. 20, an
plaintiff applied the air and brakes and took all and due precautio
to bring his train to a stop and under control before colliding wit
said train No. 20, but because of the defects in the brakes and a
equipment on plaintiff's train, said brakes and air refused to wor
notwithstanding the fact that plaintiff took, used and employed a
due means at his command to bring said train to a stop; that sa
equipment was furnished the plaintiff with said motor, and plainti
prior to the time of the accident complained of, believed said equi
ment to be in good working order, as he had a right to b
19 lieve; that because of said defects in said equipment, and th
failure of the air upon said train to work so as to set th
brakes, plaintiff was unable to bring his train to a stop, and a nu
ber of people, passengers upon plaintiff's said train and upon sa
train No. 20, were killed and injured; that if defendant was co
pelled to pay the sums of money mentioned in said cross-complaint
the defendant herein, it was because of its negligence in not furnis
ing plaintiff with proper and safe equipment with which to opera
his said train, and any damages paid or injuries done to the pa
sengers on either of said trains was because of the fault and neg
gence of the defendant, and without fault or negligence on the pa
of the plaintiff whatsoever.

Wherefore, Plaintiff prays that the defendant take nothing by
cross-complaint herein, and that plaintiff have judgment as pray
for in its complaint.

(Signed) BELDEN & LOSEY,
Attorneys for Plaintiff.

STATE OF WASHINGTON,
County of Spokane, ss:

Edgar E. Campbell, being first duly sworn, on oath deposes a
says: That he is the plaintiff in the above styled action; that he h
read the above and foregoing Reply, knows the contents thereof a
that the same is true as he verily believes.

(Signed) EDGAR E. CAMPBELL.

20 Subscribed and sworn to before me this 24th day of Febr
ary, 1913.

(Signed) E. H. BELDEN,
Notary Public for the State of Washington, Residing at Spokane.

Endorsements: Service of the within Reply, by a true copy thereof, admitted at Spokane, Wash., this 24th day of February, 1913. (Signed) Graves, Kizer & Graves, Attorneys for Defendant. Reply to Answer to 3rd Amended Complaint. Filed in the U. S. District Court for the Eastern District of Washington, April 28, 1913. W. H. Hare, Clerk. By Frank C. Nash, Deputy.

In the District Court of the United States, Eastern District of Washington, Northern Division.

No. 1471.

EDGAR E. CAMPBELL, Plaintiff,
vs.
SPOKANE & INLAND EMPIRE RAILROAD COMPANY, a Corporation, Defendant.

21 *Verdict.*

We, the jury in the above-entitled cause, find for the plaintiff, and fix the amount of his damages at the sum of $7,500.00 (Seventy-five Hundred Dollars).

(Signed) S. BARGHOORN, *Foreman.*

Endorsements: Verdict. Filed in the U. S. District Court for the Eastern District of Washington, May 5, 1913. W. H. Hare, Clerk.

In the District Court of the United States, Eastern District of Washington, Northern Division.

No. 1471.

EDGAR E. CAMPBELL, Plaintiff,
vs.
SPOKANE & INLAND EMPIRE RAILROAD COMPANY, a Corporation, Defendant.

Special Verdict.

Did the plaintiff Campbell receive, before leaving Cœur d'Alene, train order No. 53, reading as follows:

"Train Order No. 53.

From Spokane 7-31-1909.

To Motor 5 at C. D. Alene Station.

22 Motor 5 will run Spl. C. D. Alene to Spokane meet special 4 east at Alan."

Yes.

(Signed) S. BARGHOORN,
Foreman of the Jury.

Endorsements: Special Verdict. Filed in the U. S. District Court for the Eastern District of Washington, May 5, 1913. W. H. Hare, Clerk.

In the District Court of the United States, Eastern District of Washington, Northern Division.

No. 1471.

EDGAR E. CAMPBELL, Plaintiff,
vs.
SPOKANE & INLAND EMPIRE RAILROAD COMPANY, a Corporation, Defendant.

Special Finding I.

Q. Were the air brakes on Campbell's train immediately before the collision insufficient to enable Campbell to control the speed of the train?

Answer. Yes.

(Signed) S. BARGHOORN,
Foreman of the Jury.

Endorsements: Special Finding I. Filed in the U. S. District Court for the Eastern District of Washington, May 5, 1913. W. H. Hare, Clerk.

23 In the District Court of the United States, Eastern District of Washington, Northern Division.

No. 1471.

EDGAR E. CAMPBELL, Plaintiff,
vs.
SPOKANE & INLAND EMPIRE RAILROAD COMPANY, a Corporation, Defendant.

Special Finding II.

If you find that plaintiff left Cœur d'Alene in violation of his orders, then answer this question: Was that leaving in violation of his orders the proximate cause of the accident?

Yes.

(Signed) S. BARGHOORN, *Foreman.*

Endorsements: Special Finding II. Filed in the U. S. District Court for the Eastern District of Washington, May 5, 1913. W. H. Hare, Clerk.

In the District Court of the United States for the Eastern District of Washington, Northern Division.

EDGAR E. CAMPBELL, Plaintiff,
vs.
SPOKANE & INLAND EMPIRE RAILROAD COMPANY, a Corporation, Defendant.

24–31 *Motion for Judgment Notwithstanding Verdict.*

Defendant moves the court to enter judgment in its favor herein, denying plaintiff relief and dismissing his action, notwithstanding the general verdict returned in his favor by the jury empaneled in this cause, upon the ground and for the reason that the special verdicts or findings returned by the jury in answer to the interrogatories submitted to them by the court are inconsistent with the general verdict in plaintiff's favor, and entitles defendant to judgment as herein moved.

Dated this 7th day of May, 1913.

(Signed) GRAVES, KIZER & GRAVES,
Attorneys for Defendant.

Endorsements: Service of the within motion is hereby acknowledged this 7th day of May, 1913. (Signed) Belden & Losey, Attorneys for Plaintiff. Motion for Judgment Notwithstanding the Verdict. Filed in the U. S. District Court for the Eastern District of Washington, May 7, 1913. W. H. Hare, Clerk. By Frank C. Nash, Deputy.

* * * * * * *

32 In the District Court of the United States for the Eastern District of Washington, Northern Division.

EDGAR E. CAMPBELL, Plaintiff,
vs.
SPOKANE & INLAND EMPIRE RAILROAD COMPANY, a Corporation, Defendant.

Order.

Defendant's motion for judgment upon the special findings of the jury notwithstanding the general verdict returned in plain-
33 tiff's favor is denied, to which ruling the defendant excepts and its exception is allowed.

Dated this 15th day of August, 1913.

(Signed) FRANK H. RUDKIN, *Judge.*

Endorsements: Order Denying Motion Notwithstanding Verdict. Filed in the U. S. District Court for the Eastern District of Washington, August 15, 1913. W. H. Hare, Clerk. By Frank C. Nash, Deputy.

In the District Court of the United States for the Eastern District of Washington, Northern Division.

EDGAR E. CAMPBELL, Plaintiff,
vs.
SPOKANE & INLAND EMPIRE RAILROAD COMPANY, Defendant.

Petition for a New Trial.

Defendant prays the court to grant it a new trial in the above entitled action for the following causes:

1. Insufficiency of the evidence to justify the verdict, such insufficiency consisting in the following matters, to-wit:

(*a*) The evidence showed and the jury have found that plaintiff was injured by reason of his violation of his orders in leaving
34 Cœur d'Alene without having orders against regular train No. 20.

(*b*) The evidence shows and the jury have found that such violation of orders was the proximate cause of plaintiff's injury.

(*c*) The evidence shows that there was no defect or insufficiency in any particular in the brakes on plaintiff's train.

(*d*) The evidence shows that though it be held there was some evidence that the brakes upon plaintiff's train were defective or insufficient in any way, nevertheless such defect or insufficincy was not the proximate cause of plaintiff's injury.

2. That the verdict in plaintiff's favor is against the weight of the evidence and should be set aside for that reason.

3. The verdict in plaintiff's favor is against the weight of the evidence and contrary to the special findings made by the jury.

4. Errors in law occurring at the trial and excepted to at the time by the defendant. The particular errors relied upon are:

(*a*) The admission of evidence relating to the failure of the brakes to work.

(*b*) The giving of that portion of the charge to the jury which reads as follows:

"If on the other hand you find from a preponderance of the testimony that the air brakes of the car and train operated by the plaintiff were defective and out of repair at and immediately prior to the time of the collision and that the defective condition of the
35 air brakes was a direct and proximate cause of the collision or contributed directly or approximately to the collision and to the injury of the plaintiff, your verdict will be for the plaintiff."

(*c*) The giving of that portion of the charge which authorized the jury to inquire whether the proximate cause of the collision in which plaintiff was injured was the disobedience of orders by the plaintiff, or whether it was defective air brakes.

(*d*) The giving of that further portion of the charge by which there was submitted to the jury the question of whether the defective condition of the air brakes, if they were found to be defective or out

repair, was the direct or proximate cause of the collision as the
n was theretofore defined to them.

(e) The giving of that portion of the charge which, after having
ed that the one question presented to them was whether the plain-
took his train out in violation of the orders, then proceeded as fol-
s:

"The next question for your consideration will be this: 'Were the
brakes on this motor and train defective?' If you find from a
ponderance of the testimony that they were, the next queston is:
as such defect the direct and proximate cause of the injury to the
intiff?' If you are satisfied on both of these question-, or if you
swer both of these questions in the affirmative, your verdict will
for the plaintiff and it only remains to assess the amount of his
recovery."

(f) The refusal of the court to give the following charge requested in writing by defendant, to-wit:

"I charge you that if the plaintiff left Cœur d'Alene in violation the orders which he had, recklessly or willfully or with such gross gligence as would amount to recklessness or willfullness, that then d in that event, the fact that the brakes did not work, if you find ey did not, would be a wholly immaterial circumstance. Under ose circumstances the plaintiff could not rely on the brakes and in at event your verdict should be for the defendant."

(g) The refusal of the court to give the following charge requested writing by the defendant, to-wit:

"If you find from the evidence that the plaintiff left Cœur d'Alene d proceeded on his way to Spokane without receiving written orders om the train dispatcher, fixing some point where he was to meet No. , he cannot recover. The fact that when he discovered the pres- ice of No. 20 upon the track and endeavored to apply the brake, at the brake failed to work, if you find such to be the case, would ot constitute actionable negligence on the part of the defendant."

(h) The refusal of the court to give the following charge requested writing by the defendant, to-wit:

"If you find that before leaving Cœur d'Alene plaintiff received ain order No. 53 reading as follows:

7–43 "Train Order No. 53.

From Spokane 7-31-1909.

'o Motor 5 at C. D. Alene Station:

Motor 5 will run Spl. C. D. Alene to Spokane meet special 4 East t Alan"

nd left Cœur d'Alene after receiving and reading and knowing the ontents of said order and proceeding on his way to Spokane until he ame in sight of No. 20, then I charge you to find for the defendant."

The foregoing petition will be heard upon the pleadings and papers n file and upon the minutes of the court.

(Signed) GRAVES, KIZER & GRAVES,
Attorneys for Defendant.

Endorsements: Service of the within Petition for a New Trial is hereby acknowledged this 18th day of August, 1913. (Signed) Belden & Losey, Attorneys for Plaintiff. Petition for New Trial. Filed in the U. S. District Court for the Eastern District of Washington, August 19, 1913. W. H. Hare, Clerk. By Frank C. Nash, Deputy.

* * * * * * *

44 In the District Court of the United States for the Eastern District of Washington, Northern Division.

EDGAR E. CAMPBELL, Plaintiff,
vs.
SPOKANE & INLAND ELECTRIC RAILWAY COMPANY, Defendant.

Order.

Defendant's petition for a new trial is denied. Defendant excepts, and exception is allowed. Defendant may have until December 1, 1913, in which to serve and file its proposed bill of exceptions. Settlement of same to be made thereafter at earliest convenience.

(Signed) FRANK H. RUDKIN, *Judge.*

45 Endorsements: Order Denying Petition for New Trial and Order allowing defendant until December 1, 1913, to file Proposed Bill of Exceptions. Filed in the U. S. District Court for the Eastern District of Washington, October 15, 1913. W. H. Hare, Clerk, by Frank C. Nash, Deputy.

In the District Court of the United States for the Eastern District of Washington, Northern Division.

EDGAR E. CAMPBELL, Plaintiff,
vs.
SPOKANE & INLAND EMPIRE RAILWAY COMPANY, a Corporation, Defendant.

Judgment.

This cause having heretofore, on the 28th day of April, A. D. 1913, come regularly on for hearing in the above entitled court, and plaintiff appearing in said action by its attorneys, Belden & Losey, and H. L. Maury, and the defendant appearing by its attorneys, Messrs. Graves, Kizer & Graves, and upon the calling of said cause, the attorneys for the respective parties answered ready for trial, and thereupon, evidence was given and introduced, on behalf of the plaintiff and the defendant, and upon the conclusion of the evidence, the Court instructed the jury, and the jury re-

46 tired to consider their verdict, and thereafter, and on, to-wit, the 5th day of May, 1913, said jury returned and filed in this Court its verdict in favor of the plaintiff and against the

defendant, and assessing the damages of the plaintiff, against the defendant, in the sum of Seventy-five Hundred ($7500) Dollars.

Thereafter, the defendant Spokane & Inland Empire Railway Company filed its motion for judgment herein, non obstante veredicto, and said motion having been duly considered by this Court, and having been overruled by this Court, and there being no other motion pending before this Court, or reason why judgment should not be entered in accordance with said verdict,

It is now here ordered and adjudged, that the plaintiff, Edgar E. Campbell, do have and recover of and from the defendant Spokane & Inland Empire Railway Company, the principal sum of Seventy-five Hundred ($7,500) Dollars, with interest thereon at the legal rate from the 5th day of July, A. D. 1913, together with plaintiff's costs and disbursements herein, taxed at $—, and that execution may issue therefor herein.

Done in open court, and dated this 15th day of August, A. D. 1913.

(Signed) FRANK H. RUDKIN, *Judge.*

47 Endorsements: Due service of the within Judgment, by a true copy thereof, is hereby admitted at Spokane, Washington, this 14th day of August, 1913. (Signed) Graves, Kizer & Graves, Attorneys for Defendant. Judgment. Filed in the U. S. District Court for the Eastern District of Washington, August 15, 1913. W. H. Hare, Clerk, by Frank C. Nash, Deputy.

* * * * * * *

48 In the District Court of the United States for the Eastern District of Washington, Northern Division.

EDGAR E. CAMPBELL, Plaintiff,
vs.
SPOKANE & INLAND EMPIRE RAILWAY COMPANY, Defendant.

Bill of Exceptions.

Be it remembered that the above entitled cause came regularly on for trial in the above entitled court on Monday, April 28, 1913, before the Honorable F. H. Rudkin, judge presiding, plaintiff appearing in person and by his attorneys, Messrs. Belden & Losey and H. L. Maury, Esq., and the defendant being represented by its counsel, Messrs. Graves, Kizer & Graves, whereupon the following proceedings were had:

A jury was impaneled and sworn according to law, and thereupon the plaintiff, to sustain the issues upon his part, offered the testimony of the following witnesses as his evidence in chief.

49 (*Testimony of Edgar E. Campbell.*)

The plaintiff, called as a witness in his own behalf, after being first duly sworn, testified as follows:

I went to work for the defendant company in May, 1906, as a brakeman. During the same year I was promoted to be a motorman on its electric trains. On the morning of July 31, 1909, I went to work at 6:30 a. m. The train I was assigned to take out was made up of Motor No. 5, with two trailers attached, making a three-car train. On the afternoon of that day I arrived in Cœur d'Alene with my train from Spokane about 4:20. I wyed my train in the machine shops and brought it in position to return to Spokane. I then received written orders for the running of my train from Cœur d'Alene to Spokane, and oral orders from the conductor, Whittlesey. I was in the cab and he said, "All right, go ahead; get out of town." He gave me my written orders when he first approached the cab in front of the motor. I have not those orders, do not know what became of them, and am unable to produce them. I was injured shortly after those orders were handed to me, and was unconscious for about a week. I started to read the orders to the conductor, and he said, "All right; get out of town." I finished reading him my orders, put them in my pocket, and started. The conductor is my superior, but he cannot give you orders to pull out unless you have orders to pull out. The written order I received from Mr. Whittlesey said that Motor 5 would
50 run special Cœur d'Alene to Spokane and would meet No. 20 at Allan; that was my written order handed me by Conductor Whittlesey. Immediately after he had handed me the orders and I had started to read them to him he told me to pull out, and I proceeded west toward Spokane. Those orders were received at Cœur d'Alene, Idaho, and were to run to Spokane, Washington. As I passed the wye at Cœur d'Alene and got on the main line, I looked at my time table to make my meet on No. 22. Then I turned around and turned the cushion over on top of the compressor, and just as I turned around again I saw No. 20 coming. After leaving Cœur d'Alene, I first took down my time card to ascertain where we would meet No. 22, and then changed the cushion because the compressor was hot to sit on. Upon seeing the approaching train, I did what we term in railroading "dynamite her." I gave all the air I had. It caught hold and was making a stop very nicely when all of a sudden it released, and the train shot forward. I then reversed my motors, and I suppose it cleaned the line because I did not have any power immediately after I reversed. There was no hand brake in the cab. If the air had worked properly and held when the first application was made, I could have stopped my train before running into the other train. If the brakes had been working properly, I could have stopped my train in about 60
51 feet, probably less than that. I was running about 30 miles an hour when I applied the air. There were people standing back of me. I don't know whether they were watching me or no

Just as I turned around, looking forward after having fixed the cushion, I saw the other train coming, and just as I started to turn off my power somebody back of me hollered "Give her the big hole." That is what I spoke of a while ago, "dynamiting," giving all the braking power you have is termed the "big hole," emergency. When I first applied the air it took hold and held for approximately, I should judge, 35 or 40 feet, then let loose; everything released without any action on my part. After the air released, there was nothing I could do to stop my car after reversing it. I held my hand on the jack. The practical way of operating the car in the case of emergency where you have occasion to reverse a motor is to throw your jack first because the momentum of your car after you throw your reverse throws practically enough momentum there to take hold a little bit. I pulled my jack first, then pulled my reverse back, and after I did that I saw we were getting pretty close together and I gave my car and the controller a point and threw in my jack to get my power from the trolley wire to cause friction in my motor to get my motors in the reverse bearing. I was in that position when we struck the other train. There was nothing else I could do to bring the train to a stop. If there
52 had been a hand brake there I probably could have checked the speed of the train to a certain extent, but I could not say that I could bring it to a stop with the amount of weight I had behind me. I judge there were about 300 passengers on the train, the three cars being jammed full. When brakes are in proper working order they do not release after the air is applied unless they are released by the party controlling it, and they were not released by me.

I was injured in this collision. I had both of my legs broken, sustained internal injuries and the hearing of my right ear is gone. My right leg is three inches short, and my left leg is six inches short. I was unconscious for a long time after the accident. I have no personal knowledge of how long a time I was unconscious. When I became conscious I found myself in the Hospital at Cœur d'Alene. I remained there approximately eight weeks. I was conscious part of the time and part of the time I was not for at least two weeks. After probably two weeks had elapsed I gained strength in a way until, I think it was the fifth or sixth week, and I was set back with injuries in my stomach. The right leg knitted together while I was in the Cœur d'Alene Hospital; that is the one that overlaps. My left leg, I think that was operated on once out there: I was in the surgery once and I was confined in a Fracture Box all the time I was
53 there; I suffered intense pain all the time. My right ear did not bother me particularly, only the hearing was gone and it is still affected to the extent that I can not hear anything at all with that ear; the hearing is absolutely gone. After leaving the Hospital at Cœur d'Alene, at about the end of the eighth week, I was brought to the St. Luke's Hospital in Spokane, and I remained there until the 12th day of December, 1909. I was taken to St. Luke's Hospital on Sept. 21, 1909; on that date I was operated upon. The operation consisted of the removal of fragments of bone to the extent of six

inches in the left leg. I suffered severe pain all the time I was there until I got out, and I am still suffering pain. I have an infection that goes through my foot and also through the side of my left leg. It breaks out about every four or six weeks and pus and matter run out of it. It appears to be caused from a screw being loose in the silver plate, which fastens the bone together in my left leg. I am affected very greatly by climatic conditions and suffer great pain at times. It has affected my nervous system to the extent that I do not have very much left. I can sleep but very little, probably three or four hours a night. This sleeplessness is caused from pain.

Just prior to this accident I was earning on an average of about One Hundred Twenty-five Dollars ($125.00) per month, now I am earning Seventy-five Dollars ($75.00) per month, as Treasurer of the Brotherhood of Railway Trainmen. I have been thus
54 employed since Jan. 1, 1912, and prior to that time I did not have any employment. The position I now hold is elective, and it is not permanent.

Cross-examination:

When I said that I had been looking at my time table to make a meet on No. 22 I meant that it is the duty of all special trains to look out for all regular trains and to make meeting points with them, unless you are directed to make a meeting point by train order from the dispatcher. Regular trains are run on schedule time, and the motorman running a special train has to watch out to make a meet for them. Unless he has special orders to meet them at some place, he has to look out for them himself. When a motorman running a special train is not given orders about regular trains, then he must himself look out for them, and at whatever place they are to be at a certain time, he must be on the switch out of their way so that the regular train might pass, and this is so without any orders being given. A special train is a second class train and a regular train is a first class train, and second class trains are required to clear the first class trains at least five minutes. No. 20 was a regular train, and Motor 5 that I was running was a special train. Unless I had special orders covering the case, I was required to look out for the regular train. When I pulled out of Cœur d'Alene on July 31st, it was my
55 duty to keep clear of No. 20, if I had not a special order telling me where to meet it. If I did have a special order telling me where to meet No. 20, then I would meet it at that place. If I had not had a special order telling me where to meet No. 20, then it was my duty to be at a place where No. 20 could pass in safety. On the morning of July 31st, I took Motor 5 out of the terminal station in Spokane. It was coupled up with its trailers when I took charge of it. It was fifteen or twenty minutes, possibly not that long, after I got into the cab before I started. I tested my air before I started. It was my duty to do that. I had to have clearance orders before I could leave. I don't remember whether I ran special all day or not. I was on Motor 5 all day, and did not change the trailers during the day. I was on the start of my third trip between Cœur d'Alene and Spokane on that day when I was injured. When you

e running a regular train, if you are going to run right through on
iedule and are not going to meet trains in any unusual place, we
ve no orders except to clear for Cœur d'Alene. If you are running
ecial, you may have orders to run giving you the power to make
ur own meets, or the dispatcher may make meets for you on other
ecial trains, or on regular trains, through the orders. We may
ve an order reading that you would run special from Spokane to
Cœur d'Alene without anything further in it, and when we
have such an order I make my own meets on the regular
trains. There are many different ways for a dispatcher to put
out an order. We may have an order that Motor 5 would run
ecial from Cœur d'Alene to Spokane and meet any regular train
special train at any designated point, and meet more than one.
hen I said I turned my train in the shop wye at Cœur d'Alene, I
eant that I backed in the shop and headed out, thereby turning my
in around so as to head back toward Spokane. There is a wye
me distance west of the shops on which trains which could not turn
the shop were turning. I had a small equipment that could turn
the shop. I wyed at the shops all day. The shops at which I
yed were right across the street from the depot in Coeur d'Alene.
ne other wye was about half a mile or three-quarters
st of the depot. On the map which is shown me I
e the lake front of Cœur d'Alene lake, with a wharf running
it into it. The depot is right at the end of that wharf
the point marked "D." The shops are across the street
the points marked "S," "S," and the wye that I turned
runs into those shops. Following along the right of way to a
int on the map opposite what is marked as "Lot 12" I see a white
ne turning to the left and downward, and running down opposite
point, to a place marked "Lot 10." I see another white line turning
and coming down and joining that one. It is supposed to be the
wye which is some distance west of the depot, but it does not
look far enough up. The wye, however, is up there some-
where. (The map was marked with the letter "W" at the
nction of the two tracks.) If a train were going to turn at the wye
arked "W," it would come in from Spokane, turn off at the outer
g of that wye, run down through the letter "W" until the hind car
uld clear the junction of the two tracks, then the switch would be
rned and it would back down, going out on the other leg of the
ye. If a train going out of Cœur d'Alene was going to meet a train
ming into Cœur d'Alene at the wye, it could stop between the two
gs of the wye, though if it did it could not see the train that was in
e wye. If I was to meet a train at the wye, I would stop on the
ain line on this side of the wye and would stand there until the in-
ming train had gone onto the wye, and then I would go on out.
rains were supposed to stay at the terminal in Cœur d'Alene until
e other trains came in. They did not have the right to go out to
e wye unless they had orders to. I never waited at the wye for in-
ming trains. Before I became a motorman I was examined in
riting as to my duties, successfully passed the examination, and
as then promoted to be a motorman. The order I received to run

special from Cœur d'Alene came from the dispatcher at Spokane. I understand his name was McMaster. Such an order is transmitted by telegraph or telephone to an operator at Cœur d'Alene who
58 writes it down on manifold copy, making two or three copies, or as many as the dispatcher requires him to make. Those orders are written on tissue paper. He writes on one and it copies through carbon so as to make additional copies; then he wires it back to the dispatcher in Spokane to be sure that he has made his copy correct. If it is correct, the dispatcher orders the operator at Cœur d'Alene to put the signature of the superintendent to the order. When that is done, the operator delivers the orders to the conductor and the conductor reads the orders back to the operator, and then the operator signs what we call an O. K. and complete on the order, the time of receipt, the signature of the conductor and engineer, or motorman, as the case may be, and acceptance of the order. A copy of the order is given to the conductor for himself, and also a carbon copy of it is given to the conductor to be handed to the motorman. These carbon copies are identical. The agent himself keeps one of them, the conductor gets one from the agent for himself, and he also gets one for the motorman. My conductor, Whittlesey, got orders that day and delivered my copy to me. I was in the cab when he delivered it. I read it and then I think I put it in my pocket. Generally I keep all my orders for the day together. I may put them in my pocket or I may hang them on my hook. The clothes
59 I had on that day were all torn to pieces. I have had inquiry made for the orders I received, and I could not find them.

After I got my orders, read them, and put them in my pocket, or on the hook, the conductor said "All right; go ahead" and then I started. We were in Cœur d'Alene about ten or fifteen minutes from the time we arrived until we started for Spokane. I did not test my air before I left. There were men in Cœur d'Alene for that purpose. I was in my cab all the while. I did not test the air from the cab. Cœur d'Alene is a terminal station. I didn't test my air because they have men there for that purpose, men to inspect the train. I didn't have anybody to go into the cab to test the air. I was the only person who could do that, being in the cab and having charge of the machinery. I didn't test it because the train stopped when I came out on the wye and when I applied it. A man testing air, he will set his air in the cab and then go around the entire train to find out whether the air is working or not. They had a man there for that purpose, and that is the reason I did not test my air. I didn't know that anybody inspected it there. I had made two round trips and a half that day between Cœur d'Alene and Spokane. My air had been working all right all day. When I wyed in, it was working all right. When I started out and released it to go, it was working all right, and the first time that I found anything the matter with it was
60 when I used it in that particular position. I am familiar with the rules of the company. Rule 241 in the Book of Rules, marked "Defendant's Exhibit 1" for identification which you show me reads as follows:

"Conductors and Motormen or Enginemen will give air brakes

sonal attention and exact similar care from Brakemen, and will start a train from a terminal, or from any point after switching been done, cars set out or picked up, engines or motors changed, where for any reason train pipe has been disconnected, until after est of air by Car Inspectors or by train and Enginemen or Motor-n."

That rule was in force at the time of the accident. Cœur d'Alene terminal. I did not test my air before starting it, nor have any-dy else test it. (Thereupon the book of rules was received in evi-nce and marked "Defendant's Exhibit 1.") The book of rules, far as relates to air brakes, received in evidence and marked De-ndant's Exhibit 1" reads as follows:

"240. Motor-, Engine-, Train- and Yardmen must be thoroughly nversant with the use and care of air brakes.

241. Conductors and Motormen or Enginemen will give air brakes rsonal attention and exact similar care from Brakemen, and will t start a train from a terminal, or from any point after switching has been done, cars set out or picked up, engines or motors changed, or where for any reason train pipe has been disconnected, until after a test of air by Car Inspectors or by rain and Enginemen or Motormen.

242. Before commencing the descent of steep grades, and approaching locations where failure of brake would be attended with nzard, Enginemen or Motormen must make sufficient application ascertain that brakes are in operating condition.

243. If an Engineman or Motorman calls for brakes on an air ntrolled train, it will be the immediate duty of trainmen to rapidly nd fully apply hand brakes, and if emergency exists, one of the rew near the rear of the train must try conductor's valve or open rain pipe.

244. Before starting, Trainmen will see that hand brakes are re-eased.

245. Report must be telegraphed to Superintendent if brakes ound defective while on the road to such extent as to interfere with roper control of train or to require special arrangements, and in very case Conductor will make report covering such defects to Shop Foreman or Inspector, upon arrival at terminal.

246. In making up train, all couplings must be united so that rakes apply throughout the train.

247. In detaching engines, motors or cars, couplings must be parted by hand, previously closing the train line stop cocks.

32 248. Air must be fully released from cars set out of trains on siding, and hand brakes set.

249. Brake gear adjustment should be such that when brakes are fully applied, pistons will travel not more than eight nor less than six inches.

250. When in emergency, brakes are applied by opening conductor's valve, this valve must be held open to allow air to escape until train stops. This method of application should be used only when absolutely necessary. Enginemen or Motormen, upon finding that brakes have been applied by Trainmen, or automatically, must at once aid in stopping train, by turning handle of brake valve to service

stop position, thereby preventing escape of air from main reservoir.

251. Uniform air pressure of seventy pounds should be maintained in train line.

252. Enginemen and Motormen must avoid roughť handling of trains by applying or releasing brakes.

253. On long descending grades it is important to control speed of train and at the same time maintain a good working pressure. Greater time for re-charging is obtained by considerably reducing the speed of the train just before re-charging, and by taking advantage of the variation of grades and curves.

254. When two engines or motors are coupled together at the head of train, both will be connected to train line.

63 (*a*) Both may be used to charge a train when train is standing.

(*b*) When running, air will be controlled by leading engine or motor.

255. A passenger train ascending mountain grades assisted by a helper in advance will be controlled by air from regular engine or motor, train line being cut through the helper, from which, in case of emergency, application may be made.

256. Motormen will be provided with air brake instruction book by Superintendent."

I first saw No. 20 just rounding the curve after we had passed the wye at the spot marked with a cross on the map. She seemed to be coming at full speed and I was going at full speed. I picked up to about thirty miles an hour after we had passed the upper wye marked "W." We could run at any rate of speed through the yards, so we were under control. When I saw No. 20 I dynamited my car. When I saw her I shut off the power; then I dynamited it; th-ew my air brake into emergency so as to give all the air I had. The air brakes took hold, awhile and then they broke loose, the air released from the train. They held about 30 or 40 feet, something like that, approximately. When they took told, they checked the speed of the train to about twenty miles an hour, I should judge. After they let loose, the train shot forward at approximately eighteen or twenty miles an hour. It slowed up a little bit and started

64 to pick up speed again. Then I stopped it a little bit with my reverse, so that at the moment of collision I think we were going about fifteen miles an hour. I was probably about 200 feet from No. 20 when I reversed. I did everything that could be done to stop the train after the air let loose.

My train probably run between 750 and 800 feet after my brakes released, before the collision occurred. The brakes were not working during that time, and had no effect. People upon the train when it is dynamited would feel a sudden jerk, a very considerable jar, such as is produced by nothing else in the operation of trains. There are several causes for air brakes releasing when they have once taken hold right. One cause might be a piece of dirt in the triple valves. The triple valves are a part of the air appliance; some of them are underneath the cars and some of them are in the cars. There are several other things, such as dirty valves in connection with the cylinders. They are so numerous that I cannot name them. I am

not so conversant now with air as I was at that time. Those two causes are the only ones I can think of at the present time—dirt getting into the triple valves, or the triple valves getting dirty; or rust or water will sometimes do it. When I wyed in at the shops at Cœur d'Alene all the day before the brakes had been working all right. If there was any dirt got into the triple valves, it was
65 not necessarily between Cœur d'Alene and the point where I saw Motor 20. It might have been in there all the time. It was the first time that the valve had been used in that position for some length of time. It is not very often that a motorman has occasion to use his emergency brakes to slow her, to put that kind of a strain. He is not supposed to test his air in all positions in the yards. It is very impractical for a man in any service, any emergency appliances. When a train is standing still and I am testing the air from my cab, I can test it in all positions. I don't know whether the brakes broke in two when I applied them or not; they could do it. If there was an air connection brake in the train line, they might break from putting them on too hard. Possibly it would break the brake-beam, or something like that. It would not release the air unless you broke the cylinder: that would release it. If you did not apply your emergency properly, that might have happened. I don't know what did happen, and I don't think anybody else does, either.

Redirect:

The station of Alan is four miles west of the station of Gibbs. Gibbs station being between Cœur d'Alene and Alan station. The accident happened at Gibbs. When air is released, the cars sometimes kick forward, or lurch forward.

66 Recross-examination:

The initials R. C. B. at the bottom of a train order were the superintendent's signature, R. C. Bowdish. They appeared at the bottom of all train orders and all bulletins. This bulletin dated July 17, 1909, is signed by the motormen, including myself, and shows that I received that order. I do not know when after July 17th I got order not to turn the trains at the wye. It may have been a verbal order from the superintendent, and it may have been a bulletin, and it may have been a train order. I don't remember anything about it. That bulletin may have been annulled; it must have been annulled, or I would not have been turning my train at the shops. That is the only reason I can give for saying it was annulled. (The paper shown the witness marked "Defendant's Exhibit 2 for identification.")

(Testimony of Ed Trudell.)

Called as a witness on behalf of the plaintiff, after being first duly sworn, testified as follows:

I am a brakeman in the employ of the Great Northern Railway

Company. I was a brakeman for the defendant on July 31, 1909, working for Whittlessey on Special 5. Plaintiff was the motorman. I was on special train No. 5 out of Cœur d'Alene. We started out from Cœur d'Alene that afternoon, and the wreck occurred
67 soon after. My attention was first directed when Campbell set the air, and I went back and looked out the rear platform and saw the other train coming, and jumped off. I went back because Campbell set the air. When he set the air I went to the rear platform and looked out and saw the other train coming, and jumped off. He set the air unusually hard, so hard I wanted to see what was the matter. I was in the front car, about six feet from the rear platform, going up to the front end to see what orders they had. The car was crowded, people standing in the aisles, and the platform was full. When I felt the emergency applied I went to the back platform. The emergency checked the train, of course. I felt it go on there, his setting the brake hard, and I got busy getting to the back end to see what was the matter. Then I saw the train coming, and jumped off. The train was going about twenty or twenty-five miles an hour when I jumped. The train did not go over a car's length after I jumped before the collision. I got off the back end of the motor-car.

Cross-examination:

The moment the emergency was applied I turned and went out on the platform, saw the other train coming, immediately jumped, and then the crash came. He applied the emergency hard. I can-
not say how far the train ran after he applied the emergency
68 until it hit the other train. I just had time to get off; it ran all of 150 feet. It took me about fifteen or twenty seconds to get off. I don't know whether the emergency was on when I jumped off. I didn't pay any attention to that. The minute I felt the emergency I thought there was something the matter, and when I looked and saw the other train, I jumped.

(Testimony of Edward L. Dixon.)

Called as a witness on behalf of the plaintiff, after being first duly sworn, testified as follows:

I was in Cœur d'Alene, Idaho, on July 31, 1909, and started from there for Spokane on an electric train. I met plaintiff that afternoon. He was motorman on the train. I saw Campbell when he started, I was in the front end of the motor-car, about three or four feet from him. The train started from Cœur d'Alene about 4:30. It must have gone a mile and a half or two miles when I noticed another train coming. My attention was directed to it by Mr. Beck saying: "My God, look! They're coming!" Then he said, "Give her the big hole." The trains were then about 200 yards apart. Campbell applied the emergency brake and it held for a few seconds and then leaked off. It slackened the speed of the train probably six or eight miles an hour. The train was going about

twenty-five or thirty miles an hour when he first applied the
69 emergency, and the trains were then about 200 yards apart.
I remained on the train until they hit. There was a partition between the baggage compartment and Campbell's cab, with a door in it, and the door was open. I didn't exactly see Campbell right up to the collision. I got back in the baggage compartment as far as I could away from the front door, and that shut off my view of him. After the emergency failed to work, he was trying the hold the jack. I was formerly a railroad employe and am familiar with air brakes similar to the one on his train. I know how air brakes work when they are in proper condition. The air brakes on this train did not work as if they were in proper condition. If these brakes had been in proper condition, that train could have been stopped in about 225 feet. I was standing so close to the door because the train was so crowded that was the only place we saw where we could ride. I saw orders delivered by Mr. Whittlesey to Campbell at Cœur d'Alene and heard remarks made when he delivered the order. First Campbell said, "Shall we go?" and Mr. Whittlesey says, "Yes; we had just as well go, I guess." That was in Cœur d'Alene. Immediately after that, Campbell got on the train and pulled out. I had just met Whittlesey that afternoon. Whittlesey got his orders from Mr. Cook, the trainmaster, and it was not over five minutes from that before we pulled out.

70 Cross-examination:

Cook was on the west side of the depot when he handed Whittlesey the orders. I know they were orders because I saw Whittlesey and Campbell reading them. They read them before Campbell got in the cab. Campbell was not on the cab when he got the orders and read them. He and Whittlesey were both on the ground, close to the train. Whittlesey handed a copy to Campbell and kept a copy himself. I was standing there with them. I had not yet got on the train, and after they had each read them, Campbell says, "Well, shall we go," and Whittlesey says, "Well, I guess you might as well," and then Whittlesey went and got on the train. Campbell climbed up into his cab, and I got up into the crowded car. We got on in front at the baggage compartment door. Everybody seemed to be taking their time. Whittlesey stood there and read his orders, and Campbell stood there and read his. Then everybody climbed on, and in a few seconds they started. I saw Campbell climb in his cab. He got in through the baggage compartment door himself, the same as I did. There were a number of people in the baggage compartment; they were all standing. I was standing on the right hand side of the door. The door that opens into the cab. Campbell was about
three feet from me. There was nobody in the cab but Camp-
71 bell. I didn't see the other train coming before Beck hollered. I was looking at the scenery along side the track. I was looking through the door. The door between the cab and the baggage compartment. The door was in front of us. I was looking out in front. When Beck shouted I got back in the baggage car

as far as I could away from the front end. Beck stayed on the train until he saw the brakes leaked off, and then he went out the window. I could not back very fast because there were so many people in the baggage compartment. Campbell applied the emergency brakes and then it leaked off. It held, I should judge, a matter of thirty or forty feet. I didn't back while the brakes were leaking off. I supposed they were holding. I could feel them leaking out a little later on when they began to get loose. They commenced to loosen when we had gone fifteen or twenty feet. I began to back away as soon as I noticed the brakes were leaking off. The brakes didn't leak off in fifteen or twenty feet, they were further than that, I should judge about thirty or forty feet, before they finally leaked off. I didn't stand in the door until they leaked clear out. I knew they were going to leak off. The train I was on slackened its speed. The application of the air reduced it somewhat. It didn't appear to slacken much after they leaked out. The air leaked out gradually. As long as the brakes held the
72 speed was reduced, and after the air had leaked out the train continued on its way, but didn't increase its speed any. The applying of the brakes reduced the speed. I didn't take particular notice whether after the brakes released there was much slackening of the speed of the train. I was a locomotive fireman on the Northwestern for about four years, and while there had occasion to use air brakes, and have stopped trains with them.

Campbell's train consisted of three cars. I don't know exactly the size of the cars; they are smaller than ordinary standard coaches; they are about half as big as such coaches.

(Testimony of William Beck.)

Called as a witness on behalf of the plaintiff, after being first duly sworn, testified as follows:

On July 31, 1909, a party of six or seven, of which I was one and Mr. Dixon another made a trip to Cœur d'Alene. Mr. Dixon and I are both railroad men. I have been engaged in railroading as brakeman and conductor on the Northwestern lines for about seventeen years. I knew Mr. Cook when he worked on the Northwestern a good many years ago. He introduced me that day to Whittlesey and Campbell, and when we were about to leave, Dixon and I got in the baggage compartmnet. In this motor-car there was a partition somewhere about eight feet from the front part of the car with a door on either side, and I think the baggage compart-
73 ment, as near as I can figure it, was about eight feet square. The motorman sits right in front in his compartment. There is a partition between the motorman's compartment and the baggage compartment, with a door in it. In the rear of the baggage compartment there is another door leading into the passenger compartment. I was standing right in the motorman's door on the left side with Mr. Dixon standing on my right. Mr. Dixon and I were standing there visiting in the door, and when we got out somewhere near the curve I noticed the other train approaching. The

motorman was turned around, had his back to the approaching train, and I called to him. If I remember right I said, "For God's sake shut her off." Mr. Campbell pulled his air immediately, but it jumped off, or something. It just took hold for a short length of time and then the car plunged ahead again. I cannot say what he did after that. I was too busy trying to find a safe place to light. I dove through the window right opposite the motorman on the side. They went probably 100 or 150 yards after the air began to leak before I jumped. I think I hit the ground about thirty feet before they struck. I was right alongside the second car when they met. There was no way for me to escape. I could not get back through the crowd. I was a very large man and there was no way for me to get out. The cars were pretty well crowded; they were all standing up in the baggage compartment. When the air was
74 first applied, it had an observable effect upon the train. At the first emergency he gave it, it took hold, and then it jumped off for some reason or other. I am a railroad man of a number of years' experience. If the air had been working properly I could not say whether that train would have been brought to a full stop, but the train could have been brought to as near a stop as the other one did, it is my idea if the air had worked.

Cross-examination:

I suppose we were about 250 yards away from the other train when I first saw it—about 750 feet, I should say. I don't know, I could not state exactly. Our motorman wasn't looking, he had just turned around his back, something behind his wheel there. I could not say what it was. He had his back to the train when I called his attention to it. I called his attention to it as soon as I saw it. I was the first man who saw it. We were going about twenty-five miles an hour. I cannot say whether if the air had been working properly we would have come to a stop before the collision. I cannot tell you much about the brakes on these electric trains as I never had any experience. I think they could probably have slowed down so there would not have been so much danger, but I cannot say whether they would have stopped it. I said to the motorman "For God's sake shut her off." Then he turned around and looked forward. He turned around; he had his back—working
75 somewhere behind on the machine, what they call it I can't tell you anything about it; had his back to the front end, down in the corner there. Something was wrong with his seat, or something he was working with, and when I called him he immediately threw on the emergency. I cannot say how far she ran after the brakes took hold before they let loose. She took hold for a very few seconds and then jumped off again. They might have run twenty, or thirty, or forty feet. It is pretty hard to tell in a case of that kind. She did not increase in speed from the time the brakes let loose until they hit. The first emergency slowed the train a certain amount. We were probably going about twenty miles an hour after she slowed up. Campbell was down on the ground when I met him at Cœur d'Alene and shook hands with him. Cook in-

troduced me to him and Whittlesey. Campbell was standing on the ground and got right on the train after I was introduced to him. He got on before I did. I didn't hear any conversation between Cook and Whittlesey.

(Testimony of Philip Beck.)

Called as a witness on behalf of the plaintiff, after being first duly sworn, testified as follows:

I was a passenger on the train coming to Spokane which collided with another train near Gibbs on July 31, 1909. I was in the motor-car in the rear seat that went crossways on the south side of the car. I was talking when I felt the brakes applied
76 giving such a jar that I stuck my head out of the window and saw another train coming. I called out they were coming together. I thought he could stop the train, but the air held for an instant, then it released, and we went on, and it was probably a matter of ten seconds until they collided. Our car ran right under the other motor-car. Their motor was right up on top of ours.

(Testimony of Edgar E. Campbell.)

The plaintiff, recalled for further cross examination, testified as follows:

If the paper which you showed me yesterday (being Defendant's Exhibit 11) purporting to be train order No. 53 had been delivered to me at Cœur d'Alene as my train order to run on that trip from Cœur d'Alene to Spokane, it would have been my duty to have remained in Cœur d'Alene until No. 20 was in.

Whereupon, plaintiff rested, and thereupon the defendant, to sustain the issues on its part, introduced the following testimony:

(Testimony of W. C. Mock.)

Called as a witness on behalf of the defendant after being first duly sworn, testified in substance as follows:

That he was the resident engineer for defendant and the map shown him and introduced in evidence as Defendant's Exhibit No. 9 was the same as the map shown to plaintiff and concerning which he was examined, save that the tracks were marked on it in
77 red, that the Cœur d'Alene depot was at the point marked "D" and that the shops in Cœur d'Alene were across the street from the depot at the points marked "S" and "S"; that there are two tracks from the depot at Cœur d'Alene to the east arm of the wye, which is in the west part of the Cœur d'Alene yards, and that the junction of the two arms of the wye is marked "W"; that the Cœur d'Alene yard limits are in the west end of the yard away from the depot at the point marked "WY," while the other end of the yard limits was east of the depot on the Hayden Lake line; that

going on west from the west switch of the wye there was a three degree curve marked "C," and continuing on west the east switch to Gibbs is reached, marked "ES"; that going further on is the west switch at Gibbs marked "WS," and 300 feet west of the west switch is the shelter station, the passenger stop at Gibbs, marked "SS," and that going still further west is the Northern Pacific track crossing over defendant's lines, marked "NPT"; that the wye at the further end of the Cœur d'Alene yards is to turn trains on; that trains coming from the west, if they want to turn on the wye, would head in on the west switch of the wye, go up on the oil spur, and back up on the other leg of the wye, and then they would be turned around headed west again.

78 (*Testimony of James Delaney.*)

Called as a witness on behalf of the defendant, after being first duly sworn, testified as follows:

I am a motorman in the defendant's employ, and on July 31, 1909, was motorman on No. 20. It was a regular train. I had no orders to meet the special Motor 5 and having no orders had the right of way into Cœur d'Alene. Special Motor 5 was the train that collided with No. 20. My train was about 400 feet west of Gibbs station, I should judge, when I first saw Motor 5 coming. I was slowing down to stop at Gibbs. Motor 5, I should judge, was about 800 feet away when I first saw it. I applied the emergency brake and brought my train to a stop before the collision, within a distance of about 200 feet. No one was injured on my train. I was running about eighteen miles an hour when I saw the other train. At this time all trains were turning on the wye in the west end of the Cœur d'Alene yards, excepting No. 24, and this was done in accordance with a bulletin which had been issued some time before. Train No. 24 was excepted because it was a train that run through to Hayden Lake, and so had to proceed on its way east after stopping at the depot in Cœur d'Alene. All the Cœur d'Alene trains turned at the wye and backed in. That order had not been annulled on July 31st.

Cross-examination:

My train was heavier than special Motor 5. We were going about eighteen miles an hour, and I stopped within 200 feet. I have
79 run equipment No. 5 and if everything had been in working order, in the same position that Campbell was in that day, I could have ordinarily stopped it within 400 feet from the time I applied my brakes.

(*Testimony of F. D. Seymour.*)

Called as a witness on behalf of the defendant, after being first duly sworn, testified as follows:

I am a conductor in defendant's employ, and was the conductor of No. 20 at the time of the collision with special Motor 5 at Gibbs.

I had no orders to meet special No. 5 at Alan, or anywhere else. The train was a regular one running on schedule time, and having no orders, it was my duty to proceed on to Cœur d'Alene. If orders had been given Motor 5 to meet us at Alan, we should have had orders to meet Motor 5 at Alan. At this time and for some days before we were turning our trains on the wye in the west end of the Cœur d'Alene yards in pursuance of a bulletin to that effect which was issued and had not been annulled.

Cross-examination:

No. 20 was about ten or fifteen minutes late that day.

(*Testimony of F. W. Stranger.*)

Called as a witness on behalf of the defendant, after being first duly sworn, testified as follows:

I am a motorman in defendant's employ, and on July 31,
80 1909, was operating an extra passenger train, special No. 4.
At the time of the wreck I was running my train from Spokane to Cœur d'Alene running special. We had orders to meet special No. 5. These orders were in writing and delivered to me in the regular way. I did not keep them, and don't know what became of them. I got my orders at Spokane Bridge, which is about ten miles from Gibbs. When the wreck took place we were on the sidetrack at Alan. We had been at Alan six or eight minutes before we heard of it. In accordance with our orders, we went to Alan to meet special 5 and headed in on the sidetrack. The conductor called up the dispatcher after we had been there probably five minutes, and after he went to the telephone booth and tried to call up the dispatcher, he came out and called me to the 'phone, and said there was a wreck at Gibbs. We remained at Alan about half an hour, and then received orders to go somewhere else. At this time all Cœur d'Alene trains were turning on the wye in the west end of the yards, pursuant to a general bulletin. The equipment of special Motor 5 that Campbell was running was exactly like the equipment on my train, and both were made up of three cars.

Cross-examination:

A duplicate of my orders were in the conductor's hands; also there is a duplicate of the orders in the hands of the other trainmen we
were to meet, and a copy kept in the dispatcher's office at Spo-
81 kane. The operator at Spokane Bridge is supposed to keep
a copy of the order too. I had driven equipment No. 5 several times before the day of the collision.

(*Testimony of C. W. Morrison.*)

Called as a witness on behalf of the defendant, after being first duly sworn, testified as follows:

I am a conductor in defendant's employ. On the day of the

Gibbs wreck I was conductor of Motor 4. It was running on orders. I received written orders to meet special 5 on that date. I have not got my orders, and do not know what became of them. We don't keep them after they have been fulfilled. We got the order at Spokane Bridge. I first heard of the wreck at Alan. Our order was that Motor 5 would run special Cœur d'Alene to Spokane, meeting Motor 4 at Alan; that meant that my train and special 5 were to meet at Alan. When we got to Alan we headed in on the sidetrack to meet Motor 5. We waited there a few minutes before I called up the dispatcher from the telephone booth. There is no operator at Alan. I called up the dispatcher to see if he had changed the meet on Motor 5 and when I took down the phone I heard them talking over it about the wreck at Gibbs. We remained at Alan about forty-five minutes and then left under other orders. At this time it was our instruction to turn all Cœur d'Alene trains on the wye in the
82 west end of the Cœur d'Alene yards. Our equipment, and the equipment of Special 5 were similar, both being small trains. The paper you hand me purporting to be train order No. 53 addressed to Motor 5 at Cœur d'Alene is a copy of the order that we had. The order we had we received at Spokane Bridge. It would be addressed to Motor 4 instead of Motor 5. The signatures of the conductor and motormen would be different, but the body of the order was exactly the same. The order meant that we were to meet Special 5 at Alan.

Cross-examination:

We never kept the orders after they were fulfilled. There may have been a rule that we should turn the orders in at night. I am not sure. I know it was not obeyed. The order was in my possession when I knew of the wreck.

(*Testimony of H. G. Whittlesey.*)

Called as a witness on behalf of the defendant, after being first duly sworn, testified as follows:

I am in the train service of the Oregon-Washington Railroad & Navigation Company. On July 31st, I was a conductor in the defendant's employ. I was a conductor on Special 5. The plaintiff was my motorman. All trains going to Cœur d'Alene turned on the wye in the west end of the yards at that time in pursuance of a posted bulletin. No. 5 had on that day and its previous trips headed in on the wye, turned and backed down into what was called the
83 Hayden Lake branch. This was being done during the rush due to the land registration at Cœur d'Alene. In the afternoon of that day after backing in and getting ready for departure two copies of train orders were handed to me. These were duplicate copies, carbon copies, and they were just alike, one for the motorman and one for myself. I read one myself and gave the other one to Campbell. He didn't read it to me, but he unfolded it and started to read it after I gave it to him. I don't know whether he read it.

I afterwards give my order to Mr. Bowdish, the superintendent of the company. The paper you show me purporting to be train order No. 53 dated July 31, 1909, is a copy of the order I handed Campbell. The order shown the witness was admitted in evidence, marked "Defendant's Exhibit 11," and is as follows:

"Spokane & Inland Empire Railroad Co.

Train Order No. 53.

From Spokane 7-31-1909.

To Motor 4 at C D Alene Station:

Motor 5 will run Spl CD Alene to Spokane meet Spl 4 East at Alan.

R. C. B.

Conductor, Motorman, Engineer and Brakeman must each have a copy of this order. Conductors receiving orders at station where there is no operator will not use clearance, but will have
84 motorman repeat orders to dispatcher, at which time complete will be given.

Conductor		Motorman or Engineer
Whittlesey		Campbell
Train	Complete	Operator
Spl. 5	427 p. m.	Smith."

The initials R. C. B. at the bottom are those of the superintendent, Mr. Bowdish. The name at the bottom is Smith, the operator taking the order. After delivering the order to Campbell and reading my own order, I told him that No. 20 was not in yet, to go to the wye for them. That is where they were in the habit of turning to come down to Cœur d'Alene into the depot. We knew No. 20, when it came in, would have to run into that wye and we were to wait at the wye for it. Just before the train started I walked around in front of the motor and got on the baggage compartment of the motor, and then it started. I handed Campbell the order and told him to go to the wye, that No. 20 wasn't in, to go to the wye for it. He says, "All right; are you ready?" I says, "Yes, let her go," and then walked around in front of the motor, and then got into the baggage door, or the baggage compartment of the motor, and started taking tickets. The train started, and the next thing I knew I felt the air applied, and I supposed that he was running over the wye somewhat, and seeing 20 coming was going to back up, but he kept on going a little further, and the wheels began to slide and
85 I knew that something was going to happen, and I turned around in the aisle and braced myself, and then the crash came. I have no idea how long it was after I felt the air applied before the crash came. I would not say over twenty seconds at the

outside. I have no accurate idea. I was in the center way of the passenger compartment of the motor when the crash came. I started taking my tickets in the baggage compartment and after I felt the air applied I didn't have time to do anything besides brace myself before the crash came. After he left the station at Cœur d'Alene until I felt the brakes come on, I didn't pay any attention to what Campbell was doing. It was my duty to have seen that Campbell stopped at the wye, but I didn't do so, and I was discharged by the company because I did not, and have not been in the employ of the company since. I supposed Campbell would look out for it. He had been. No. 20 was overdue when we left Cœur d'Alene. Anyone where my train was could see she was not in, and I knew it was not in. It was Campbell's duty and mine not to leave Cœur d'Alene under that order until No. 20 was in, and to do so before No. 20 was in was a direct violation of all the rules of railroading. I had no orders about running the train other than the one just introduced in evidence. I had no orders against 20 at all, only verbal orders
86 from the trainmaster to go to the wye instead of waiting at the depot until she came in. We had a clear view from the depot to the wye so that we could see that 20 was not in all the way between the wye and the depot. If No. 20 was coming from the other side of the wye, she would have to stop and switch in at the wye. When the emergency brakes were set, they did not go off, they just kept grinding until the collision.

Cross-examination:

The main line of the road extends down to the depot. No. 20 coming in had a right of way over the main line right straight through to the depot. We had equal rights inside the yard limits on the Cœur d'Alene side of the wye. When I told Campbell to pull out to the wye, I put him on the main line. We had equal rights with No. 20 to the yard limit board. The order of July 17th to turn at the wye could have been revoked at any time. The order was not permanent, just during the rush. I should judge the train was running about 20 or 25 miles an hour when I felt the air. It was less than half a mile from the point where we started to the wye. The point of the accident was about a mile beyond the wye. I read my orders. I suppose you might call me the superior officer in charge of the train. I was equally in charge of it with the motorman. In regards to safety, the conductor of the train does not correspond with the captain of a ship. I allowed the train to run a mile beyond
87 the wye without ringing any bell to stop it, not knowing where I was. I was in the middle part of the passenger department of the motor-car, but I don't know how far the train ran after I felt the application of air, maybe two or three hundred feet; I could not say; I did not sign the order, Defendant's Exhibit No. 11. Campbell did not. It was given to me by Mr. Cook, the trainmaster.

I felt the effect of the air brake upon the train just before the collision. The application was severe, the emergency, they were all on at once. I could tell that. It checked it quite a bit so there was a jar. You could feel the jar. It decreased the speed of the train quite

a bit. I cannot say how much. When it struck the other train it was probably going between fifteen and twenty miles an hour. It had been going twenty to twenty-five when we first set the air, and my best estimate is it was going fifteen miles an hour when it struck the other train.

Redirect:

The paper you hand me I recognize as the duplicate of the order that has been identified and received in evidence, marked Defendant's Exhibit 11. It is the duplicate of one of the orders that I was handed by the trainmaster that day. It looks like the one I had and gave to Mr. Bowdish.

Paper received and admitted in evidence, marked Defendant's Exhibit No. 12, and is as follows:

88 "Spokane & Inland Empire Railroad Co.

Train Order No. 53.

From Spokane 7-31-1909.

To Motor 4 at C D Alene Station:

Motor 5 will run Spl. C D Alene to Spokane meet Spl. 4 East at Alan.

R. C. B.

Conductor, Motorman, Engineer and Brakeman must each have a copy of this order. Conductors receiving orders at station where there is no operator will not use clearance, but will have motorman repeat orders to dispatcher, at which time complete will be given.

Conductor.		Motorman or Engineer.
Whittlesey.		Campbell.
Train,	Complete.	Operator,
Spl. 5.	427 p. m.	Smith."

Sub-division "G" of Rule 165 of the rules of the defendant company was in force at that time. The rule was admitted in evidence, marked Defendant's Exhibit 13, and is as follows:

"Responsibility for protection of a train rests with Conductor and Motorman or Engineman, and they must know that their Brakemen, Flagmen and Firemen are conversant with and fully understand the application of all rules relating to the protection of trains, and comply therewith."

(Testimony of —— Lacey.)

Called as a witness on behalf of the defendant, after being first duly sworn testified in substance as follows:

89 That he was a clerk in the superintendent's office of the defendant company, and at the request of the counsel for the

company he made search of the records of the office for train orders to Motor No. 5 on the day and trip of the wreck; that he found the duplicate of Defendant's Exhibit 12, but was unable to locate any other duplicates; that he found also the paper marked "Defendant's Exhibit 2 for identification" which was thereupon admitted in evidence and marked "Defendant's Exhibit 2," and reads as follows:

"July 17th, 1909. All concerned, Cœur d'Alene Division. Turn your train as you go into Cœur d'Alene. This does not include No. 24. This until further notice, R. C. B.," with names of motormen and conductors signed to it.

(Testimony of K. W. McMaster.)

Called as a witness on behalf of the defendant, after being first duly sworn, testified in substance as follows:

That on the day of the Gibbs wreck he was a train dispatcher in defendant's employ, with his office at Spokane; that he was on duty at the time of the wreck; that the duties of a dispatcher are to supervise the movement of trains over the roads; that he kept a record of train orders in a train order book, and also a train sheet showing the movements of all trains during the twenty-four hours; that in the train order book were kept copies of all train orders issued;
90 that the train orders are numbered consecutively starting with No. 1 at midnight and running in consecutive numbers to midnight of the next night. He identified the train order book handed him as the one kept in the dispatcher's office on July 31, 1909; that order No. 53 as it appeared in the book was the record of the train order of that number duly issued. Taking order 53 as an instance of the method of dispatching trains, that order was put out to Spokane Bridge to Special Motor 4 east and to Cœur d'Alene to Motor 5 just starting out of Cœur d'Alene, which is a running order, an order to go out on the main line for Special Motor 5. It was put out simultaneously to Spokane Bridge and to Cœur d'Alene being sent by telegraph to the operator at Spokane Bridge and to the operator at Cœur d'Alene. When they received the order, they repeated it back to the dispatcher to see if they had it correctly. The dispatcher at that time made a record in the book from the order as repeated to him. When it was repeated correctly, a complete was given by the dispatcher, and the completed order, with the clearance attached, entitled the train to leave the station where they received the order under that order. The train must operate under such an order until it is annulled. Train order No. 53 as it appeared in the dispatcher's book which is admitted in evidence and marked "Defendant's Exhibit 14," is as follows:

91 "(53)

B R C & M Spl 4 E Comp Clear 425 p G
Ca C & M M & R 5 Comp Clear 427 p NS
Motor 5 will run Spl C D Alene to Spokane meet Spl 4 E at Alan."

This identical order was telegraphed to Special 4 and Special 5. The one to Special 5 was addressed to the conductor and motorman of Special 5 at Cœur d'Alene, and the other was addressed to the conductor and motorman of Special 4 east; otherwise they were identical. When 4 and 5 received the order they understood they must go to that point to pass the other train, and not leave there until the other train had passed. No orders were sent out by the dispatcher on July 31st except those which appear in the book. . If an order has been sent to Motor 5 to run special Cœur d'Alene to Spokane meeting No. 20 at Alan, a corresponding order would have been sent to No. 20. Such an order would restrict the right of No. 20 and No. 20 would have to have the order. On the afternoon of July 31st, Special 5 was cleared at the dispatcher's office to leave Spokane for Cœur d'Alene at 2:49. We keep a train sheet also in the dispatcher's office. This train sheet was made by all the dispatchers who worked that day, three different dispatchers: C. M. Sewall from 12:01 a. m. to 7:00; A. S. Bimrose from 7:00 a. m. to 10:30 a. m.; W. W. NcMaster, from 10:30 a. m. to 7:30 p. m.;
W. C. Dunning from 7:30 p. m. to 10:00 p. m.; C. M. Sewall
92 from 10:00 p. m. to 12 midnight. The record of every train going was kept on the sheet, showing the motor number, conductor, motorman, etc., and the time of arriving at and leaving every station between Spokane and Cœur d'Alene. The arriving and leaving time is given the dispatcher by the operator and the dispatcher enters the time on the sheet as it was telephoned to him by the operator. On Special Motor No. 5's trip from Spokane to Cœur d'Alene on the afternoon of July 31st they left the terminal at Spokane at 2:50, went by the dispatcher's office at East Spokane at 3:00 o'clock, Greenacres at 3:25 p. m., without stopping, arriving at Spokane Bridge at 3:38, leaving 3:40; by Post Falls at 4:04 p. m.; arrived at Cœur d'Alene 4:20 p. m. The record shows that special 5 left Cœur d'Alene on its return trip to Spokane at 4:30 p. m. That is the last record of it. It didn't get anywhere else. No. 20 on that day left Spokane terminal at 3:12 p. m.; dispatcher's office at 3:20 p. m.; arrived at Greenacres at 3:49 and left at 3:50 p. m.; arrived at Spokane Bridge at 4:05, departed 4:08; arrived at Post Falls at 4:22, departed at 4:23; arrived at Cœur d'Alene at 7:00 p. m., being delayed by the wreck. The nearest station to Alan is Post Falls. It left Post Falls at 4:23, which is two miles from Post Falls to Alan, so that No. 20 would be at Alan about 4:30. Special Motor 4 east
on this trip left Spokane terminal at 3:45 p. m.; dispatcher's
93 office at 3:55 p. m.; Greenacres at 4:25 p. m.; arrived at Spokane Bridge at 4:35 p. m., departed 4:36 p. m.; by Post Falls at 4:48. No arriving time is shown at Alan because there is no operator there, but it should have arrived at Alan about 4:55, between 4:50 and 4:55. Special Motor 5 leaving Cœur d'Alene at 4:30 should have arrived at Alan at about 4:45 if it had not been for the collision. Every train being operated on the division is operated from the train sheet and the time card. There can be no mistakes in the train sheet, or wrecks would occur. Special trains are inferior trains and regular trains superior ones. Inferior trains

must keep clear of superior trains. Dispatchers do not notify the specials where the regulars are. The special knows of the regulars by the time cards and the train registers at the terminal station. If a special has no orders to meet a regular at any particular place, it must keep clear of the regular train.

A rule of the company required the conductor and motorman to sign orders received by them, but it was not always lived up to. Sometimes they were signed by the dispatcher or trainmaster for the purpose of expediting the movement of trains. No. 20 was due at Cœur d'Alene at 4:12 p. m., so it was due there before Special 5 actually reached that point.

Redirect:

The fact of the regular train being late would not make any difference as to the duty of the special to wait for it until it
94 was twelve hours late. When a regular train is twelve hours late, it loses both right and class. No. 20 was only a few minutes late and was just the same as being on time. Special 5 had to wait for it. Special trains on the Cœur d'Alene division are numbered by the motor-car number. Special 5 left Spokane on the afternoon of July 31st for Cœur d'Alene twenty-two minutes ahead of No. 20, and came in ahead of it, Special 5 reaching Cœur d'Alene at 4:20 p. m. and No. 20 not reaching there until 7 p. m.

(*Testimony of R. C. Bowdish.*)

Called as a witness on behalf of the defendant, after being first duly sworn, testified as follows:

In 1909 I was superintendent for the defendant. I remember the wreck at Gibbs. Defendant's Exhibit 2 is a bulletin issued by me providing for the turning of trains into Cœur d'Alene at the wye in the yard. That bulletin was in force on July 31st. It was put in effect because there was a land registration at Cœur d'Alene and we were handling from 10,000 to 12,000 people a day. There was always a swarm of people over our tracks and around the station, and that bulletin was issued to avoid accidents and expedite the movement of trains and passengers in and out of the depot. During that period if an outgoing train was ready to go and an incoming train had not arrived, the outgoing train would pull out slowly and go out of the crowd to the wye and wait until the in-bound train
95 reached there and headed in on the wye. There is a clear view from the depot to the yard limits board, which board is in the neighborhood of 1000 feet west of the Spokane leg of the wye. A day or two after the accident, I met W. G. Graves, one of the company's counsel, in Cœur d'Alene, went with him to the depot, hunted over the operator's files and took the operator's copy of the order that was issued to Motor 5; then went down to Conductor Whittlesey's house and got his copy of the same order. I examined those two copies and they are exactly alike, being taken on manifold. Those two orders were used before the coroner's inquest

and at the investigation afterwards held in the Federal court room, and they were then placed on file in my office. I would recognize those orders if I were to see them. I recognize Defendant's Exhibit 12 as one that Mr. Graves and I got at Cœur d'Alene. Defendant's Exhibit 11, I did not see until in the last three or four days when Mr. Graves showed it to me in his office.

Cross-examination:

I cannot say that Exhibit 12 is the very sheet of paper that I have seen before, but it is the same numbered order, the same date, and my recollection is that it is the same wording that I saw on the order obtained in the office. The two copies I had I gave to my chief clerk and told him to file them.

96 (*Testimony of W. G. Graves.*)

Called as a witness on behalf of the defendant, after being first duly sworn, testified in substance as follows:

That he was one of defendant's attorneys; that a day or two after the accident he went with Mr. Bowdish to the agent's office at Cœur d'Alene and procured the agent's copy of order No. 53; then went to Whittlesey's house and obtained from him what he furnished as the copy of the same order, the running order that he had for Special 5 out of Cœur d'Alene. The two copies were compared and found to be the same. They were produced at the coroner's inquest, together with the train order book which has been introduced in evidence and which shows order No. 53. The papers were then taken either by Mr. Bowdish or Mr. McMaster and kept for about a week and then used before an investigating committee which was inquiring into the cause of the wreck. After that hearing, the papers were turned over to someone in the superintendent's office. Defendant's Exhibit 12 is just like one of the orders we had at that time. Defendant's Exhibit 11 was received from Mr. H. K. Relf some week before the trial, was placed by the witness in his safe and kept there until the time of the trial; that order is exactly in the condition in which it was received from Mr. Relf.

97 (*Testimony of H. K. Relf.*)

Called as a witness on behalf of the defendant, after being first duly sworn, testified in substance as follows:

That he obtained Defendant's Exhibit 11 from Charles Porter at Ashland, Oregon, on June 25, 1912; that the order was initialed by Mr. Porter before its delivery, was brought by Mr. Relf to Spokane and given to Mr. Graves; that it was the same paper that he saw in Porter's office at Ashland, and afterwards obtained from him there; that he paid Porter one hundred dollars for the order.

(Testimony of Charles Porter.)

Called as a witness on behalf of the defendant, after being first duly sworn, testified in substance as follows:

That he resided at Ashland, Oregon; that he was living in Cœur d'Alene at the time of the Gibbs wreck; that the day after the wreck, while out at the scene of it, he picked up certain papers by the wrecked motor which he recognized as train orders; that one of those was Defendant's Exhibit 11; that he afterwards marked it as it appears and sent it to Mr. Relf, being paid one hundred dollars by Mr. Relf for the order.

(Testimony of K. W. McMaster.)

Re-called as a witness on behalf of the defendant, after being first duly sworn, testified as follows:

I examined the train order book after I was on the witness stand yesterday, and there is no order there directing Motor 5 west
98 to meet No. 20 at Alan. It would not be possible for such an order to have been issued by me without it appearing in that book. The only orders which were issued to No. 20 on that date are train order No. 46 delivered to No. 20 at the dispatcher's office at Spokane, which reads:

"Special 9 west will meet No. 20 at Orchard Avenue."

That order was delivered to Special 9 west at Greenacres. Another order to No. 20 is train order No. 50 which was delivered to No. 20 at Spokane Bridge and reads "No. 20 will meet No. 21 at Spokane Bridge." Those are the only orders to No. 20 that day; otherwise it was running on its schedule.

(Testimony of W. B. Burdick.)

Called as a witness on behalf of the defendant, after being first duly sworn, testified as follows:

I was master mechanic for defendant at Cœur d'Alene on July 31, 1909. I know the plaintiff Campbell, and remember the Gibbs wreck. I know Motor 5 and its apparatus. I did not receive from Mr. Campbell, or from any other source, any complaint about the condition of the brakes on Motor 5. I was there when Motor 5 pulled out and heard the conversation between Campbell and Whittlesey. Whittlesey was at the cab window, the motorman's cab window, and all I heard was, "Go to the wye for 20," handing him his orders.

99 *(Testimony of Charles Pierson.)*

Called as a witness on behalf of the defendant, after being first duly sworn, testified as follows:

At the time of the Gibbs wreck I was living at Gibbs and saw the wreck. I was standing beside the track about 250 feet from where

they struck. When it passed me, it had not slackened its speed. After it had gone by me it did slacken. It had passed me possibly 75 or 100 feet when it slackened up quite a little. It kept on losing speed all the time as near as I can tell, so that when it struck it was running quite a good deal slower than when it passed me. I don't know enough about the speed of trains to have any idea how fast it was running; when it passed me and when it struck. I saw the east-bound train coming just as the motor-car on the west-bound track passed me. I could not see any slackening of speed then, and about seventy feet after that it commenced to slack and kept on slacking until it struck.

Cross-examination:

The marks I put on the map introduced in evidence were about where I was standing. The "T" is where I saw the west-bound train first; the "N" is where I first saw the east-bound train. The west-bound train had not quite come to the straight track when I first saw it. There must have been fifteen or twenty seconds, possibly half a minute, between the time I first saw the west-bound train and the collision. The west-bound train was coming from Spokane,
100 going to Cœur d'Alene, and it was entirely in view when I saw it. When I first saw the west-bound train the motor-car and part of the second car were coming out of the curve.

Re-redirect:

As to the number of seconds that elapsed from the time I saw the train until the time of collision, that is pure guesswork on my part.

(Testimony of G. Gray.)

Called as a witness on behalf of the defendant, after being first duly sworn, testified as follows:

I was a brakeman on Special No. 5 on the day of the Gibbs wreck. Going into Cœur d'Alene on that afternoon the train was turned at the wye in the west end of the Cœur d'Alene yards. When we left Cœur d'Alene on the return trip to Spokane, I was standing on the front platform of the last car, between the second and third cars. Just at Gibbs station I felt the brakes go on. They seemed all to go on, that is about all I remember. I got down on the steps to see what was the matter, and just as I got on the steps I was thrown off, or jumped off, I don't know which. I didn't have time to see another train. I was about half way of the middle of the car when I picked myself up.

(Testimony of R. W. Butler, Charles P. Haywood, O. G. Fjerstead, R. D. Shinn, H. J. Gibbon and William O'Brien.)

Were called as witnesses on behalf of defendant, sworn and testified in substance as follows:

101 That they were passengers on Special No. 5 leaving Cœur d'Alene on the afternoon of July 31st; that immediately be-

fore the crash of the collision came they felt a jerking, jarring, and grinding of the train as though the brakes had been applied very hard, or something of that sort; that it was so severe as to cause a lurching or jerking of the train, and that it was followed almost immediately afterwards by the crash of the collision.

(*Testimony of William W. Moffit.*)

Called as a witness on behalf of the defendant, after being first duly sworn, testified as follows:

I was in the defendant's employ as air brake inspector at Cœur d'Alene at the time of the Gibbs wreck. Prior to the beginning of the land registration at Cœur d'Alene, I went over the air brake equipment on the cars that were used between Spokane and Cœur d'Alene, thoroughly cleaning and oiling the triple valves, brake cylinders, and going over the pipes to look for leaks, repair whatever defects I could find in the equipment. I am acquainted with Motor No. 5, and remember it being at Cœur d'Alene before starting on the trip to Spokane which resulted in the wreck. I made an inspection of the air brakes on that train after she came in from Spokane on that trip. When she backed in from the wye and stopped on the Hayden Lake track I looked over the train
102 for leaks, applied the brakes, made a slight application, went down and looked under each car to see if the brakes would leak off, went up into the cab and released the brakes, and then made an ordinary service application to see if the brakes would hold in service, released the brakes and went down under the train to see if they released properly. I found them in perfect working order. During the land registration rush, I made such an inspection of every train that came in.

Cross-examination:

It took me two or three minutes to make the inspection. I made what is called a terminal inspection, what is required of a train before leaving a terminal. The air brake system was composed of a motor-driven air compressor, the main reservoir which receives the supply from the compressor, an auxiliary reservoir, which is a storage tank for air, a brake cylinder and triple valve and brake valve. I didn't inspect all those portions of the air brakes. I simply made an inspection to see that the brakes applied properly and released properly, that is a terminal test. I didn't go through and inspect the motor-driven air compressor. I looked at the gauge to see if it was running properly. If a fuse had blown, or anything else, it would show on the gauge that the generator was not working properly. Mr. Bowdish, I believe, was on the ground. He generally kind of glanced over trains as well as I did, and
103 if there had been any fuse blown or anything else I always told him regarding that. I don't remember seeing Mr. Campbell or Mr. Whittlesey. I did not see Mr. Campbell in the cab. I got in the cab through the side door of the cab and applied the air.

(*Testimony of — Mahonn.*)

Called as a witness on behalf of the defendant, after being first duly sworn, testified as follows:

I am general foreman of defendant's shops; was in the employ of the company at the time of the Gibbs wreck. I was acquainted with Motor No. 5 that was in the wreck. It was so demolished that it was never used again. The company has in its service now a motor of the same equipment, size, and everything that that motor had, with one exception, the controller on Motor 5 had the Westinghouse L4 drum type of controller; Motor No. 4 is the same as Motor No. 5 was in everything except that it has the K14 controller. The controller is the apparatus by which the electric current is worked. The air equipment on the two motors was the same.

The trailers which were with No. 5 at the time of the wreck had air equipment. The trailers were the same as the motor except that they did not have a motorman's cab, and were not equipped with a brake valve, but outside of that the equipment, the size of the cars, etc., were identical.

Cross-examination:

Motor 5 did not have a side door to the cab; it had windows on the side.

104 Redirect:

Motor 5 was divided into three compartments: First, a little cubby-hole where the motorman sits, then there was a door opening into a larger space, which was the baggage room, and then another door opening from that into a third space, where the passenger seats were.

(*Testimony of Henry John Robinson.*)

Called as a witness on behalf of the defendant, after being first duly sworn, testified as follows:

I am mechanical expert for the Westinghouse Air Brake Company, and have been such for seven years. With Mr. Mahonn I examined Motor No. 4 of the defendant company. I found it equipped with the Westinghouse Standard Automatic air brake, such as is in general service all over the country on passenger equipment. It is what is known as the automatic type. Anything that will cause a reduction of the pressure which is carried in what is known as the brake pipe extending from one end of the car to the other will cause the brake to apply. It applies when a reduction of brake pipe pressure is made either by the motorman with the motorman's brake valve, or by the conductor with what is known as the conductor's valve in each car, or by the train parting, or the brake pipe connections being broken in any manner. There is a brake valve in the motorman's cab by which the motorman has control

of the brakes and by moving the valve to application position it vents this brake pipe pump. Under each coach there is a pressure store. Each coach has its own pressure store, or what we term an auxiliary reservoir, and as the brake vent pressure is applied, or if the brake in one coach was for any purpose cut out or inoperative, the brakes on the other coaches are still serviceable and can be used. The only manner in which the brakes will apply is by the venting of the brake pipe pressure which may be caused by the moving of the motorman's valve, the opening of the conductor's valve, or the breaking of pipes under the cars, or the hose between the cars. If the pipe under the car is broken, or the hose is broken, the brakes forthwith set and neither the motorman or conductor can keep them from setting. Each car has a complete system of its own, and if the brakes on one coach are out of order, it does not affect the work of the brakes on the other coaches. If the brakes on a train of three cars of the sort that I have described were in working order on a trip and if at the terminal they were inspected by setting and found to be in working order, there is only one way in which they would refuse to work and that is by having the connections between what we term the auxiliary reservoirs and the brake cylinder in all of the cars broken. It would have to break in each individual car to make that individual brake inoperative. To my knowledge there is nothing that could happen to these brakes that would cause them to refuse to work in emergency. The Westinghouse Company has an air brake instruction book. When a test has been made, I know of nothing that would cause a brake under the stated conditions to refuse to work in an emergency. When no test has been made, there are things. There might be an obstruction in the brake pipe between one car and another which would prevent the motorman from applying the brake on the vehicle back of such obstruction. That is the reason why it is customary to make what we call a terminal test of the brakes, that is, all brakes must be tested before they leave the terminal, and that test is for the purpose of finding out if there is any such obstruction. (Thereupon the following examination of the witness occurred:)

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Q. Now, suppose, Mr. Robinson, that the train was running along and the motorman threw it into emergency and the brakes took hold, would it be possible for those brakes to take hold and hold for thirty or forty feet and then release; and, if it would be possible, state what would have to happen before that would take place?

A. It might happen if the pipe—if for any reason the pipe between the auxiliary reservoir and the pipe on each coach were broken. In that event the storage reservoir would be vented automatically and would not be available. The other means by which they would not hold is by the engineer accidentally pulling the handle of the brake valve into release position, not intentionally, but accidentally. If he did that, of course, the brakes would release because the valve is there for that purpose, to enable the motorman to release the brakes.

107

Q. Those are the only two things that could do it?

A. And there is another thing that could do it and that is—I said breaking the pipe between the auxiliary and the brake cylinder, breaking the cylinder itself or breaking the reservoir, would have the same effect, of course. And the brake cylinder is constructed in such a manner that it is necessary to have a packing in the cylinder. If that packing is blown out entirely of course the brake would leak off. But if there was no other breaks the leakage would be so slow that the stop would be made before the brakes would leak off in cases of that kind, but that is the only point which is covered by the inspection.

Q. Now, Mr. Robinson, so that it may be perfectly clear, in order for the breaking of the auxiliary pipe to cause that release, they would have to break all the separate pipes under each car, separately?

A. Yes, sir.

Q. And each pipe under each car would have to break?

A. Yes, sir.

108 Q. If just one broke it would not affect it?

A. It would affect that particular car only.

Q. But not the other cars?

A. No, sir.

Q. Of course if the cylinder would burst, I suppose that would do it, the main cylinder?

A. If the cylinder or auxiliary reservoir, that of course is connected with the pipe and would have the same effect.

Q. What is this cylinder, what is it made of?

A. Cast iron.

Q. What is its size, thickness, dimensions and what is it——

A. (Interrupting.). It is made to withstand much greater pressure than is ever used. I have never known of one breaking in service.

Q. Tell about the other, the auxiliary cylinder?

A. The auxiliary cylinder is also constructed to carry much higher pressure than is used, all tested at the works under Government specifications.

Q. Have you ever known one of them to burst?

A. No, sir.

Q. Ever hear of any of them bursting?

A. Never heard of one.

Q. Now, the only other thing you say would be the packing coming out?

A. Yes, sir, the packing in the cylinder.

Q. And that would cause it to leak?

A. Cause it to leak off, yes.

109 Q. But that would be so slow the train would have stopped before it would leak away?

A. Yes, sir, because it would have to leak out all the pressure which is in the storage reservoir under the car, because in emergency the storage reservoir is connected directly to the brake cylinder.

Q. Now, Mr. Robinson, did you ever know of a set of brakes

which would work in ordinary operation refusing to work in emergency?

A. I never knew of an automatic brake——

Q. That is what I mean.

A. That would refuse to work in emergency. In fact, it is not the general rule when inspecting brakes to use the emergency.

Q. Why?

A. Because if the brake will work in service, it is a foregone conclusion it will work in emergency. In fact, the most of our trouble is that they work in emergency when we only want them to work in service.

Q. Just explain what you mean by that now?

A. I mean by that very often when a man is desiring only to make a service stop, make a service, all of the brakes go into emergency, what we call undesired emergency, something which we have a lot of trouble in overcoming.

Q. You never have had any trouble with one that were worked in service refusing to go into emergency?

110 A. No, sir. The only time that could happen is in a long freight train where there are so many cars cut out that what we call the quick action can not jump, but in a short train never.

Q. Mr. Robinson, I want to state a hypothetical question and ask you if it would be possible to occur except from the happening of the things you have stated: Suppose a train of three cars, a motor and two trailers equipped as the one you saw, No. 4, starting operating at six-thirty in the morning from Spokane, going to Cœur d'Alene from Spokane and returning to Spokane; going to Cœur d'Alene from Spokane and returning to Spokane, a distance of approximately thirty miles, then going from Spokane to Cœur d'Alene, there being inspected and found all right, assuming that the brakes were working perfectly on two trips and a half, and that the train left the station at Cœur d'Alene, traveled about a mile and a half at a rate of approximately thirty miles an hour, twenty-five or thirty miles an hour, would it be possible under those conditions, the brakes working perfectly all this time, would it be possible under those conditions, if it were thrown into an emergency, for the emergency to hold thirty or forty feet, and then release entirely and let the train shoot ahead for a distance of six hundred feet the same as though the brakes had not been put on?

A. Not unless, as I stated before, the pipe connections under the car that I specified, were broken.

Q. The pipe connections under the car?

111 A. Under each car, yes, sir.

Q. They would all have to break at once, wouldn't they?

A. Yes, sir. If the one on the head car broke and the other two did not, the brakes on the other two cars would stop the train.

Q. Did you ever hear of a thing happening, and all of these pipes under each car breaking at once?

A. No, sir, I never did.

Q. Would it be practically possible for that to happen?

A. No, sir.

Cross-examination:

The brake is operated by venting what we know as brake pipe pressure. It relieves the pressure on what is known as the brake pipe, but there is stored under each car air for operation or for applying the brake on that car. This is compressed air, usually thirty pounds to the square inch gauge pressure, atmospheric pressure. Atmospheric pressure is not quite fifteen pounds. Gauge pressure does not show any pressure until you have exceeded the atmospheric pressure. We count fifteen absolute as nothing. When we speak of seventy pounds, or seventy-five pounds, that is gauge pressure, so much above the ordinary pressure. On the motor-car there is what we know as the compressor. It is really a pump, what
112 we call an air pump; that is only on the motor-car. It supplies the air for the auxiliary reservoir, and if the pump does not work, then there is no compressed air. The air in the auxiliary reservoir is what supplies the pressure used in the brake cylinder. It is the force used. The application of the brakes means turning that force loose against the wheel or against the brake. If the pump was out of order in the motor-car, it does not necessarily affect each one of the auxiliary reservoirs alike. If there is air already in the auxiliary reservoirs and the pump stops, the pressure leaks down in the storage reservoir when this motor does not operate, and the compressor applied to the brake would be applied automatically by reason of this leakage on account of the valve mechanism under each car being sensitive for that purpose. There is just as heavy an application of the brakes if the motor was not running and pumping as it was. Since the application depends upon the pressure which is in the auxiliary reservoir. In the event that the reservoirs were filled up and the pump was disabled for some reason, the brakes would leak on when the pressure would be down. That is why it is called an automatic brake. When I speak of the brake leaking off, I mean that if the packing leather in the brake cylinder is leaking, the brake could leak on and then leak off of that particular car. It would leak off slowly, but it could leak off if that packing leather was defective. The length of time it
113 would take to leak off would depend upon the extent of the defect. The packing is composed of specially treated leather, which is air tight. In ordinary service it will last anywhere from eighteen months to eight or ten years. Anyone who has mechanical ability and grasps the principles readily can understand the air brake system, for the principle is simple. The idea is that you have to have vent pressure in the brake system in order to obtain pressure at the brake shoes. I examined Motor 4 about ten minutes. I operated it standing, looked it over to see what kind of equipment was on it, went into the cab and operated it to see if the brakes would release and apply, and found it operated properly. (One of the Westinghouse Company's instruction books was thereupon shown the witness and identified by him.) There is what we call a whistle reservoir on this which there is not on the other; otherwise, it is the same. This whistle reservoir is

not usually used. The other differences are that the apparatus shown in this book is what we know as a combined apparatus, whereas on the car in question it is the detached, the only difference being that in the illustration the brake cylinder is connected directly to the auxiliary reservoir, but that in the car is not connected directly but by means of a pipe. The compressor is indicated by the letter "A." It is operated by means of an electric motor attached to the compressor by means of a gear. The power to
114 operate the motor comes from the trolley. It comes through a motor at each end of the car so that it can be placed at either end of the car, and then power comes through this wire, through a fuse box, and through what we call a generator, and when that generator is cut in the electricity goes through the motor and from the motor down to the generator so as to make a complete circuit and turn the motor. After the air leaves the compressor, it goes to a main storage reservoir, and there is a pipe from the main reservoir which goes to the motorman's brake valve, and with the motorman's brake valve in what we call the release position, the air is then free to go to what we call the brake pipe. The brake pipe is connected throughout the length of the train by these hose couplings, and under each coach there is what we call a branch pipe from the brake pipe which leads over to what we call the triple valve. It is so named because it performs three functions, charges the auxiliary reservoir, supplies the brake and releases it. The air from the pipe goes through this triple valve, through the auxiliary reservoir, past a very small opening which allows the pressure to pass in the auxiliary reservoir very slowly. Under certain conditions water might form in that reservoir, but it is very, very seldom. When it does, it comes from the auxiliary reservoir over into the brake cylinder, and when the brake is released it is vented
115 off. It is not cleaned out by any other method because the only other way in which there is an opening to that auxiliary reservoir is on top in this case. On the car in question there is a cock at the bottom for the purpose of bleeding the brake off, that is, releasing the brake by that means when it is desired. It is not put there for the purpose of cleaning out the reservoir. It could serve that purpose. If there is any water in it it will drain through that cock. Dirt or dust never gets in there. The air from the pump goes through a strainer before it goes over to the auxiliary reservoir. There is a strainer in the pump to prevent the dirt getting in the compressed air. If dirt got in the compressed air, it would probably make the triple valve so it would not release so readily as otherwise. If the triple valve does not release, the brake remains applied. If the compressor had not been working, there would nevertheless have been pressure in the auxiliary reservoir if there was pressure in there when the terminal test was made at Cœur d'Alene. If no terminal test was made at Cœur d'Alene it would be strictly up to the motorman for not knowing there was no air in the system. There is a possibility of there being absolutely no compressed air if there is no test made to indicate it, or if the brakes had not been

used prior to the time it was desired to use it. If the reservoir was full and the motorman makes an application or two, and his
116 pump is not working, it depletes the pressure to the extent that he uses it. If there is no way to replace it, it is weaker than at the first application. The exhaustion of the air would depend upon the number of applications he makes. The reservoir is such size that when it is full you can make several applications and releases before it is entirely depleted. If when a motorman applies the brakes there is sufficient air to set them, they would not let loose again because the reservoir was exhausted. After the brakes are once set, the motorman must release them. They would not let loose just because the pressure was not working. I have known cases of individual cars where they have leaked off owing to the fact that I spoke of before, the packing leather bing deficient. They leaked off gradually, but of course that affected only the one individual car the leak existed on. If the brakes were in perfect working condition, a motor car and two trailers full of people going at a speed of thirty miles an hour on a one per cent down grade, an application of the brakes in the emergency would stop the train, in my opinion, in between 200 and 300 feet, not more than 300, and I doubt if less than 200. Five miles an hour variation in speed would cause a variation of distance in the stop of the emergency between five and fifty feet. It is my opinion that at thirty-five miles an hour on a one per cent down grade, if the brakes had been in first class working condition, the three cars loaded with
117 people would have stopped within 300 feet after the application. The auxiliary reservoirs will not be recharged until the controller of the brake valve is placed in a release position. There could be no recharging of them until the valve handle is placed in release position. A recharging of that equipment would take about ten seconds.

Redirect:

A motorman can tell whether his pump is working. He has a gauge in the cab which indicates whether he has the pressure. He can also hear the pump working. When the car is running he can hear it. The motorman's gauge is located in different places, but it is usually in front of him as he is facing his work. If he is facing his controller, he can tell whether he has got air pressure or whether his pump is working, and if it would not work, he would know it right away. That gauge will indicate whether he has pressure or not, and exactly what the pressure is. The pump is governed automatically. There is a governor which stops the pump when the predetermined pressure is reached and starts it when that pressure falls a certain amount. The pump automatically cuts off when the proper amount of pressure has been obtained in the storage reservoir, and when the pressure in the storage reservoir has been reduced a certain amount it automatically cuts in the pressure, and the pump goes to work and restores the pressure which has
118 been used. The gauge I spoke of is just an ordinary pressure gauge such as is used on steam boilers and the motor-

an can tell by glancing at it whether he has got air. He does not ave to make a test to see whether he has air or know whether his ump is working. The only object in making the test would be to now whether the brakes are in operating condition. If the brakes perated when he came in and operated again when he set them so s to hold for thirty or forty feet, I know of only two things that ould cause them then to release, breaking connections to the brake ylinder, that is, the auxiliary reservoir or the brake cylinder itself, r putting the brake valve in release condition. I mean by that reaking the connection to the cylinders in each car. The breaking f the auxiliary reservoir or its connection with the brake cylinder n each particular car would affect that car only.

Recross-examination:

You can break the pipe on the motor car, break the storage pipe eservoir on the motor car and the brakes will apply on all of the ars. That is why it is termed automatic. They will vent the pres- ure in the storage reservoir, and that in turn being connected with he brake pipe pressure will vent the brake pipe pres- ure, which is all that is necessary to apply the brakes. They will not release automatically because they are not designed to work that way. There was a device on this car
119 called a generator. Whenever the predetermined amount of pressure in the storage reservoir is reached it automatically cts to shut down the compressor, and then that same device starts it up again when the pressure gets to a predetermined lower level. With this equipment, the storage reservoir pressure is supposed to be higher than the brake pipe pressure. I don't know what the pressure is in this particular car, but under usual conditions the pressure should start when the storage reservoir pressure reaches eighty-five pounds, and then it should cut out when it reaches one hundred pounds, so that there should be less than eighty-five pounds pressure in the storage reservoir. Of course, any mechanical device may get out of order and fail to work, although the fact that that device is on all the motor cars in the United States and Canada at the present time is an indication that it is a very reliable device. If it got out of order it might fail to start the compressor. There is usually no difference between the adjustment of a brake on a loaded car and on an empty car. The difference is that on a loaded car the brake is not as effective as on an empty car, the difference in effectiveness depending upon the load, the original weight of the car, and the load in the car. There is no law of variation there. So many conditions entering into it, there is really no law that will tell the difference except the percentage of braking power.
120 The way the per cent is figured out, that is, on a light car, we figure the braking power should equal the weight on the wheels. Pounds pressure at the brake should equal the weight on the wheels and as the weight on the wheels increases and the per- centage of braking power does not increase, it is easily to be seen that the braking per cent is less on a loaded car than it is on a light car.

Re-redirect examination:

If the generator failed to work, the motorman could have seen it in his gauge. The gauge is put there for that purpose. If his air is not working all he has to do is to use his eyes and tell it.

IN REBUTTAL.

(*Testimony of Edgar E. Campbell.*)

Plaintiff went upon the stand and testified as follows:
I didn't see the car inspector Moffit in my cab at Cœur d'Alene before I started on the return trip to Spokane.

Thereupon, both parties rested, and defendant requested the court to give to the jury the following instructions:
"If you find from the evidence that the plaintiff left Cœur d'Alene and proceeded on his way to Spokane without receiving written orders from the train dispatcher fixing some point where he was to meet No. 20, he cannot recover. The fact that when he discovered
the presence of No. 20 upon the track and endeavored to
121 apply the brake, that the brake failed to work, if you find
such to be the case, would not constitute actionable negligence on the part of the defendant.
"If you find that before leaving Cœur d'Alene plaintiff received train order No. 53 reading as follows:

'Train Order No. 53.

From Spokane 7-31-1909.

To Motor 5 at C. D. Alene station:

Motor 5 will run Spl C D Alene to Spokane meet special 4 east at Alan'

and left Cœur d'Alene after receiving and reading and knowing the contents of said order and proceeded on his way to Spokane until he came in sight of No. 20, then I charge you to find for the defendant.
"I charge you that if the plaintiff left Cœur d'Alene in violation of the orders which he had, recklessly, or wilfully, or with such gross negligence as would amount to recklessness or wilfulness, that then and in that event the fact that the brakes did not work, if you find they did not, would be a wholly immaterial circumstance. Under those circumstances the plaintiff could not rely upon the brakes, and in that event your verdict should be for the defendant."
The court failed and refused to give such instructions as requested by defendant, and he charged the jury as follows:
"This is an action to recover damages for personal injuries
122 suffered by the plaintiff through the alleged negligence of
the defendant company. It is admitted in the pleadings that the defendant is a corporation organized and existing by virtue of

the laws of this state, and on the 31st day of July, 1909, was a common carrier of passengers in interstate commerce between the city of Spokane, in the state of Washington, and the town of Cœur d'Alene, in the state of Idaho. It is further admitted that on the 31st day of July, 1909, the plaintiff was employed by the defendant as a motorman and had charge of and was operating Special Number 5 from the town of Cœur d'Alene to the city of Spokane. It is further admitted by the plaintiff in his testimony that he had no right to leave Cœur d'Alene with his train on the occasion in question without written orders, and that the order of the conductor directing him to depart would not authorize him to do so. It is likewise admitted that the plaintiff had no right to depart from Cœur d'Alene until train Number 20, with which he collided, arrived at that place unless he had written order for a meeting with Number 20 at some other point.

The allegations of negligence are contained in the fourth and fifth paragraphs of the third amended complaint. The fourth paragraph avers that the agents, officers and employees of the defendant company ordered and directed the plaintiff to take his train Number 5 and to proceed from the town of Cœur d'Alene to the city of Spokane, and to meet train Number 20 at the town of Alan;
123 that when rounding a curve near the station of Gibbs, in the state of Idaho, which is a point between Cœur d'Alene and the town of Alan, the plaintiff saw a train coming in the opposite direction on the same track, which the plaintiff is informed and believes was train Number 20. The fifth paragraph alleges that upon coming in view of train Number 20 the plaintiff used all due diligence to bring his motor upon train Number 5 to a stop; that he duly applied the air brakes upon the motor, but owing to the defective condition of the air brakes, which condition was wholly unknown to the plaintiff, the air brakes wholly failed and refused to act and the plaintiff's said motor and train rushed forward at a tremendous rate of speed and collided with regular train Number 20. The sixth paragraph avers that the collision or accident was directly chargeable to the wrongful and negligent acts of the plaintiff's superiors in giving improper orders, and in their failure to furnish the plaintiff with a motor and train supplied with proper air brakes and in good working condition.

These allegations of negligence contained in the third amended complaint are denied by the answer.

At the outset I charge you as a matter of law that the collision between these two trains was the result of gross and almost criminal negligence on the part of some officer or agent of the defendant company, and if you find from a preponderance of the testi-
124 mony, that is, from the greater weight of the testimony, that the written orders delivered to the plaintiff directed him to take his train out of Cœur d'Alene city and to meet regular train Number 20 at Alan, such negligence was not the negligence of the plaintiff, but of some officer or agent of the company, for whose acts the company is responsible, and your verdict will be for the plain-

tiff in such sum as you deem him entitled to without considering any other questions in the case. If, on the other hand, the plaintiff's orders were those offered in evidence by the defendant and directed the plaintiff to meet Special Number 4 east at Alan and not Regular Number 20 at that point, the negligence causing the collision was the negligence of the plaintiff and will bar a recovery as to the charge of negligence based on the delivery of improper orders. And if you find from the testimony that the plaintiff disobeyed the written orders delivered to him, and that such disobedience of orders was the direct and proximate cause of the injury to the plaintiff your verdict will be for the defendant. If, on the other hand, you find from a preponderance of the testimony that the air brakes on the car and train operated by the plaintiff were defective and out of repair at and immediately prior to the time of the collision, and that the defective condition of the air brakes was the direct and proximate cause of the collision, or contributed directly and proximately to the collision, and to the injury to the plaintiff, your verdict will be for the plaintiff.

125 I will define to you "proximate cause" in the language of the Supreme Court of the United States:

"The true rule is, that what is the proximate cause of an injury is ordinarily a question of fact for the jury. It is not a question of science or of legal knowledge. It is to be determined as a fact, in view of the circumstances of fact attending it. The primary cause may be the proximate cause of a disaster though it may operate through successive instruments as an article at the end of a chain may be moved by force applied to the other end, that force being the proximate cause of the movement, or as in the oft cited case of the squib thrown in the market place. The question always is was there an unbroken connection between the wrongful act and the injury, a continuous operation? Did the facts constitute a continuous operation? Did the facts constitute a continuous succession of events, so linked together as to make a natural whole, or was there some new and independant act intervening between the wrong and the injury? It is admitted that the rule is difficult of application. But it is generally held, that, in order to warrant a finding that negligence, or an act not amounting to wanton wrong, is the proximate cause of an injury, it must appear that the injury was the natural and probable consequence of the negligence or wrongful act and that it ought to have been foreseen in the light of the attending circumstances."

126 What, then, was the proximate cause of this collision? Was it a disregard or disobedience of orders on the part of the plaintiff, if you find he disobeyed the orders given, or was it defective air brakes? You must determine this question from all the facts and circumstances given in evidence. You have a right to consider the fact that the air brakes worked properly at all times during the day up to the moment of the accident; the time that elapsed between the application of the brakes and the collision; the manner in which the brakes were applied and operated as disclosed

by the testimony, and all the facts and circumstances appearing before you. And before you can return a verdict for the plaintiff based on the allegation that the brakes were defective and out of repair, you must be satisfied from a preponderance of the testimony not only that the brakes were in fact defective or out of repair, but that their defective condition was the direct or proximate cause of the collision, as I have defined that term to you. Your verdict cannot be based upon mere guess-work or speculation. You must be able to say from a consideration of all the testimony that the testimony tending to show that the brakes were defective or out of repair, and that such defect was the proximate cause of the injury, outweighs or preponderates over the testimony tending to show the opposite conclusion.

I further instruct you that the fact that the conductor on the train may have been guilty of negligence in permitting the
127 train to pass the "Y" is immaterial in this case and gives no right of action to the plaintiff. So is the fact that the orders were not signed by the conductor or motorman, and the fact that they were not delivered to the conductor directly by the train dispatcher. In other words, the material inquiry here is, what orders did the plaintiff in fact receive, and did he obey or disobey these orders.

I further instruct you that you must not be influenced by pity or compassion for any injury that the plaintiff has received, but you should judge of this case upon the evidence solely without any reference to other considerations. You will weigh the evidence in a calm, dispassionate, cool-headed manner and reach a conclusion from that, and from that alone.

As I have already instructed you, the burden of proof is upon the plaintiff to establish the material allegations of the complaint by a preponderance of the testimony. If upon any issue the testimony preponderates in favor of the defendant, or is evenly balanced, it will be your duty to find such issue in favor of the defendant. On the other hand, if the testimony preponderates in favor of the plaintiff on the issues which I have submitted to you, your verdict will be for the plaintiff and you will proceed to fix the amount of his recovery.

You, gentlemen of the jury, are the sole judges of the facts in this cause, and of the credibility of the witnesses. Before arriving at your verdict you will carefully consider and compare
128 all the testimony. You will observe the demeanor of the witnesses upon the stand; their interest in the result of your verdict, if any such interest is shown; their knowledge of the facts in relation to which they have testified; their opportunity for hearing, seeing or knowing those facts; the probability of the truth of their testimony; their bias or prejudice or the absence of either of these qualities; and all other facts and circumstances given in evidence or surrounding the witnesses at the trial.

I further instruct you that if you find from the testimony that any witness has wilfully testified falsely to a material fact you are at liberty to disregard the testimony of that witness entirely ex-

cept in so far as he or she may be corroborated by other credible testimony or by other known facts.

I further instruct you that under the law a complaint is required to be verified either by the plaintiff or by his agent under certain circumstances. If you find from the testimony that the plaintiff has wilfully sworn to some material fact which he knew to be untrue, or to something of which he had no knowledge or belief in regard to the contents of the complaint, you have a right to take that fact into consideration in determining the weight of his testimony.

I further charge you, that if the plaintiff in his original complaint in this case has alleged any material fact or facts con-
129 trary to which he has testified here, or omitted to allege any essential or material fact, which he has testified to on the trial, you may take that fact into consideration in passing upon his credibility and the weight of his testimony.

If you find for the plaintiff it will be incumbent upon you to fix the amount of his recovery. This you cannot do in dollars or cents. The law from necessity leaves that question largely to your good sense and sober judgment. You will fully compensate him for any pain and suffering he has endured in the past by reason of this accident or injury, and for such pain and suffering as you find that he will endure in the future. You will compensate him for whatever loss he has sustained through the impairment of his earning capacity in the past and for such loss as he will sustain through the impairment of his earning capacity in the future. These several items will go to make up the amount of your verdict in the event you find for the plaintiff, which amount will be limited by the prayer of the complaint.

In addition to the general form of verdict, gentlemen of the jury, I submit to you three separate findings, one is: "Were the air brakes on Campbell's train immediately before the collision insufficient to enable Campbell to control the speed of the train?" You will answer that question Yes or No.

The second is: "Did the plaintiff, Campbell, receive, before
130 leaving Cœur d'Alene, train order No. 53, reading as follows: 'Train order No. 53, from Spokane, 7-31-1909. To motor 5 at C. D. Alene station. Motor 5 will run spl. C. D. Alene to Spokane, meet special 4 east at Alan.' You will answer that question Yes or No.

The next question is as follows: If you find that the plaintiff left Cœur d'Alene in violation of his orders, then answer this question, was that leaving in violation of his orders the proximate cause of the accident?"

To place the issues in this case before you in concrete form, gentlemen. The questions presented for your consideration are rather simple. One is, did the plaintiff take his train out of Cœur d'Alene city on that night in violation of the written orders given him by the conductor? If he did, he was guilty of negligence, and if that negligence was the direct and proximate cause of his injury he has no right of action here. The next question for your consideration will be this: Were the air brakes on this motor and train defective?

you find from a proponderance of the testimony that they were, next question is, was such defect the direct and proximate se of the injury to the plaintiff? If you are satisfied on both of se questions, or if you answer both of these questions in the rmative, your verdict will be for the plaintiff, and it only re- ins to assess the amount of his recovery. The principal and vital question in the case is one of proximate cause, aside from the two issues, as to whether or not the orders were disobeyed and whether or not the air brakes were defective. You may v retire.

Gentlemen of the jury, some of you may not have sat on a jury this court before. It requires the concurrence of all twelve of ur members to return a verdict, either for the plaintiff or for defendant. You may now retire."

And thereupon the defendant excepted to the portions of the arge given by the court and to the court's refusal to charge as re- ested by the defendant as follows:

Defendant excepts to that portion of the charge given to the y in this cause which reads as follows:

"If on the other hand you find from a preponderance of the timony that the air brakes of the car and train operated by the aintiff were defective and out of repair at and immediately prior the time of the collision and that the defective condition of the brakes was the direct and proximate cause of the collision or con- buted directly or approximately to the collision and to the injury the plaintiff, your verdict will be for the plaintiff."

Defendant excepts to that portion of the charge which author- ed the jury to inquire whether the proximate cause of the col- ion was the disobedience of orders by the plaintiff, or whether it as defective air brakes.

Defendant excepts to that further portion of the charge 32 to the jury which submitted to the jury the question of whether the defective condition of the air brakes, if they were und to be defective, or out of repair, was the direct or proximate use of the collision, as the term was theretofore defined to them.

Defendant excepts to that portion of the charge which, after aving stated that the one question presented to them was whether e plaintiff took his train out in violation of the written orders, en proceeds as follows:

"The next question for your consideration will be this: 'Were e air brakes on this motor and train defective?' If you find from preponderance of the testimony that they were, the next question : 'Was such defect the direct and proximate cause of the injury the plaintiff?' If you are satisfied on both of these questions, r if you answer both of these questions in the affirmative, your erdict will be for the plaintiff and it only remains to assess the mount of his recovery."

Defendant excepts to the refusal of the court to give the following harge which was requested in writing by the defendant, to-wit:

"I charge you that if the plaintiff left Cœur d'Alene in violation

of the orders which he had, recklessly or willfully or with such gross negligence as would amount to recklessness or willfullness, that then and in that event, the fact that the brakes did not work, if you find they did not, would be a wholly immaterial circumstance.

133 Under those circumstances the plaintiff could not rely on the brakes and in that event your verdict should be for the defendant."

Defendant excepts to the refusal of the court to give the following instruction which was requested by the defendant, to-wit:

"If you find from the evidence that the paintiff left Cœur d'Alene and proceeded on his way to Spokane without receiving written orders from the train dispatcher, fixing some point where he was to meet No. 20, he cannot recover. The fact that when he discovered the presence of No. 20 upon the track and endeavored to apply the brake, that the brake failed to work, if you find such to be the case, would not constitute actionable negligence on the part of the defendant."

Defendant excepts to the refusal of the court to give the following instruction, which was requested by the defendant, to-wit:

"If you find that before leaving Cœur d'Alene plaintiff received train order No. 53 reading as follows:

'Train order No. 53.

From Spokane 7-31-1909.

To motor 5 at C. D. Alene Station.

Motor 5 will run Spl. C. D. Alene to Spokane meet special 4 east at Alan'

and left Cœur d'Alene after receiving and reading and knowing the contents of said order and proceeded on his way to Spokane until he came in sight of No. 20, then I charge you to find

134 for the defendant."

The above exceptions having been duly taken and noted in his minutes by the court, the jury retired to consider of their verdict, and thereafter returned into court with a verdict in plaintiff's favor and awarding him damages in the amount of seventy-five hundred dollars. With such verdict in the plaintiff's favor, the jury at the same time returned the interrogatories submitted to them by the court, with answers thereto as follows:

"Interrogatory No. 1. Were the air brakes on Campbell's train immediately before the collision insufficient to enable Campbell to control the speed of the train?

Answer to Interrogatory No. 1. Yes.

Interrogatory No. 2. Did the plaintiff, Campbell, receive, before leaving Cœur d'Alene, train order No. 53, reading as follows:

'Train order No. 53, from Spokane, 7-31-1909. To motor 5 at C. D. Alene station. Motor 5 will run spl. C. D. Alene to Spokane, meet special 4 east at Alan.'

Answer to Interrogatory No. 2. Yes.

Interrogatory No. 3. If you find that the plaintiff left Cœur d'Alene in violation of his orders, then answer this question, was that leaving in violation of his orders the proximate cause of the accident?

Answer to Interrogatory No. 3. Yes."

Thereafter the defendant duly filed its motion in writing
135 herein for the entry of judgment in its favor upon the special findings of the jury, notwithstanding the general verdict in plaintiff's favor, which motion was as follows:

"Defendant moves the court to enter judgment in its favor herein, denying plaintiff relief and dismissing his action, notwithstanding the general verdict returned in his favor by the jury empaneled in this cause, upon the ground and for the reason that the special verdicts or findings returned by the jury in answer to the interrogatories submitted to them by the court are inconsistent with the general verdict in plaintiff's favor, and entitles defendant to judgment as herein moved."

Such motion was by the court denied and defendant excepted to such ruling, and its exception was allowed.

Thereupon the defendant filed in court its petition for a new trial, which petition was as follows:

"Defendant prays the court to grant it a new trial in the above entitled action for the following causes:

1. Insufficiency of the evidence to justify the verdict, such insufficiency consisting in the following matters, to-wit:

(*a*) The evidence showed and the jury have found that plaintiff was injured by reason of his violation of his orders in leaving Cœur d'Alene without having orders against regular train No. 20.

(*b*) The evidence shows and the jury have found that such
136 violation of orders was the proximate cause of plaintiff's injury.

(*c*) The evidence shows that there was no defect or insufficiency in any particular in the brakes on plaintiff's train.

(*d*) The evidence shows that though it be held there was some evidence that the brakes upon plaintiff's train were defective or insufficient in any way, nevertheless such defect or insufficiency was not the proximate cause of plaintiff's injury.

2. That the verdict in plaintiff's favor is against the weight of the evidence and should be set aside for that reason.

3. The verdict in plaintiff's favor is against the weight of the evidence and contrary to the special findings made by the jury.

4. Errors in law occurring at the trial and excepted to at the time by the defendant. The particular errors relied upon are:

(*a*) The admission of evidence relating to the failure of the brakes to work.

(*b*) The giving of that portion of the charge to the jury which reads as follows:

"If on the other hand you find from a preponderance of the testimony that the air brakes of the car and train operated by the plaintiff were defective and out of repair at and immediately prior to the time of the collision and that the defective condition of the air brakes was the direct and proximate cause of the collision or contributed directly or approximately to the collision and to
137 the injury of the plaintiff, your verdict will be for the plaintiff."

(*c*) The giving of that portion of the charge which authorized the jury to inquire whether the proximate cause of the collision in which plaintiff was injured was the disobedience of orders by the plaintiff, or whether it was defective air brakes.

(*d*) The giving of that further portion of the charge by which there was submitted to the jury the question of whether the defective condition of the air brakes, if they were found to be defective or out of repair, was the direct or proximate cause of the collision as the term was theretofore defined to them.

(*e*) The giving of that portion of the charge which, after having stated that the one question presented to them was whether the plaintiff took his train out in violation of the orders, then proceeded as follows:

"The next question for your consideration will be this: 'Were the air brakes on this motor and train defective?' If you find from a preponderance of the testimony that they were, the next question is: 'Was such defect the direct and proximate cause of the injury to the plaintiff?' If you are satisfied on both of these questions, or if you answer both of these questions in the affirmative, your verdict will be for the plaintiff and it only remains to assess the amount of his recovery."

(*f*) The refusal of the court to give the following charge requested in writing by defendant, to-wit:

138 "I charge you that if the plaintiff left Cœur de'Alene in violation of the orders which he had, recklessly or willfully or with such gross negligence as would amount to recklessness or willfullness, that then and in that event, the fact that the brakes did not work, if you find they did not, would be a wholly immaterial circumstance. Under those circumstances the plaintiff could not rely on the brakes, and in that event your verdict should be for the defendant."

(*g*) The refusal of the court to give the following charge requested in writing by the defendant, to-wit:

"If you find from the evidence that the plaintiff left Cœur d'Alene and proceeded on his way to Spokane without receiving written orders from the train dispatcher, fixing some point where he was to meet No. 20, he cannot recover. The fact that when he discovered the presence of No. 20 upon the track and endeavored to apply the brake, that the brake failed to work, if you find such to be the case, would not constitute actionable negligence on the part of the defendant."

(*h*) The refusal of the court to give the following charge requested in writing by the defendant, to-wit:

"If you find that before leaving Cœur d'Alene plaintiff received train order No. 53, reading as follows:

139 "Train Order No. 53.

From SPOKANE, 7/31/1909.

To Motor 5 at C. D. Alene Station:

Motor 5 will run Spl. C. D. Alene to Spokane meet special 4 East at Alan."

and left Cœur d'Alene after receiving and reading and knowing the contents of said order and proceeded on his way to Spokane until he came in sight of No. 20, then I charge you to find for the defendant."

The foregoing petition will be heard upon the pleadings and papers on file, and upon the minutes of the court."

Such petition was denied, to which ruling the defendant excepted, and its exception was allowed. Thereupon, on motion of plaintiff's counsel, judgment was entered in plaintiff's favor upon the general verdict in that behalf returned by the jury for damages against defendant in the amount of seventy-five hundred dollars.

And now in furtherance of justice, and that right may be done, the defendant tenders and presents the foregoing as its bill of exceptions in this case to the action of the court, and prays that the same be settled, allowed, signed, and sealed by the Court, and made a part of the record in this case, and the same being in all respects regular and containing all material facts not already a part of the record herein, and having been duly and timely served and filed, the same is accordingly settled, allowed, signed and sealed by

140 the court and made a part of the record in this case on this 1st day of December, 1913.

(Signed) FRANK H. RUDKIN,
District Judge.

Endorsements: Bill of Exceptions. Service of the within Bill of Exceptions is hereby acknowledged the 18th day of November, 1913. (Signed) Belden & Losey, Attorneys for Plaintiff. Received at the Cerk's Office, November 19, 1913, and filed in the U. S. District Court for the Eastern District of Washington, after being settled and allowed by the Court, December 1st, 1913. W. H. Hare, Clerk. By Frank C. Nash, Deputy.

141 In the District Court of the United States, for the Eastern District of Washington, Northern Division.

EDGAR E. CAMPBELL, Plaintiff,
vs.
SPOKANE & INLAND EMPIRE RAILROAD COMPANY, Defendant.

Assignments of Error.

Comes now the above named defendant, Spokane & Inland Empire Railroad Company, and in connection with its Petition for Writ of Error makes the following Assignments of Error which it avers

were committed by the court in the trial of this cause and upon which it will rely in its prosecution of the Writ of Error in the above entitled cause to the United States Circuit Court of Appeals for the Ninth Circuit.

First. The Court erred in denying defendant's motion to enter judgment in its favor, denying the plaintiff all relief and dismissing his action notwithstanding the general verdict returned in plaintiff's favor by the jury herein, for the reason that the special findings returned by the jury in answer to the interrogatories submitted to them by the Court were inconsistent with the general verdict in plaintiff's favor, and entitled defendant to judgment denying plaintiff's relief and dismissing the action. Such inconsistencies consisted in that (*a*) the special findings made by the jury show that at the time plaintiff was injured he was acting without the scope of his employment; that he was acting in violation of
142 defendant's rules and violated the orders given him, and that he was in the commission of an unlawful act. (*b*) The special findings show that the sole and proximate cause of his injury was his violation of the rules and orders of the company, and his own unlawful act. (*c*) That the special findings show that plaintiff was not injured by reason of any breach of any duty which the defendant owed to him at the time he was injured.

Second. The Court erred in charging the jury as follows:

"If on the other hand you find from a preponderance of the testimony that the air brakes of the car and train operated by the plaintiff were defective and out of repair at and immediately prior to the time of the collision, and that the defective condition of the air brakes was a direct and proximate cause of the collision or contributed directly or approximately to the collision and to the injury of the plaintiff, your verdict will be for the plaintiff."

Third. The Court erred in giving that portion of the charge to the jury which authorized the jury to inquire whether the proximate cause of the collision, out of which grew this action, was the disobedience of orders by the plaintiff or defective air brakes.

Fourth. The Court erred in giving that portion of the charge to the jury whereby there was submitted to the jury the question
143 of whether the defective condition of the air brakes, if they were found to be defective or out of repair, was the direct or proximate cause of the collision.

Fifth. The Court erred in giving that portion of the charge to the jury whereby the jury were charged as follows:

"The next question for your consideration will be this: Were the air brakes on this motor and train defective? If you find from a preponderance of the testimony that they were, the next question is: Was such defect the direct and proximate cause of the injury to the paintiff? If you are satisfied on both of these questions, or if you answer both of these questions in the affirmative, your verdict will be for the plaintiff, and it only remains to assess the amount of his recovery."

Sixth. The Court erred in refusing *the* give the jury the following charge requested in writing by the defendant, to-wit:

"I charge you that if the plaintiff left Cœur d'Alene in violation the orders which he had recklessly or willfully or with such gross ligence as would amount to recklessness or willfullness, that then l in that event, the fact that the brakes did not work, if you find y did not, would be a wholly immaterial circumstance. Under se circumstances the plaintiff could not rely on the brakes, and that event your verdict should be for the defendant."

Seventh. The Court erred in refusing to charge the jury as requested by the defendant, as follows, to-wit:

"If you find from the evidence that the plaintiff left Cœur d'Alene and proceeded on his way to Spokane without receiving written orders from the train dispatcher, fixing some point ere he was to meet No. 20, he cannot recover. The fact that when discovered the presence of No. 20 upon the track and endeavored apply the brake, that the brake failed to work, if you find such be the case, would not constitute actionable negligence on the part the defendant."

Eighth. The Court erred in refusing to charge the jury as rested by the defendant in writing, as follows, to-wit:

"If you find that before leaving Cœur d'Alene plaintiff received in order No. 53, reading as follows:

"Train Order No.53.

From SPOKANE, 7/31/1909.

o Motor 5 at C. D. Alene Station:

Motor 5 will run Spl. C. D. Alene to Spokane meet Special 4 East Alan."

d left Cœur d'Alene after receiving and reading and knowing the ntents of said order, and proceeded on his way to Spokane until e came in sight of No. 20, then I charge you to find for the dendant."

Ninth. The Court erred in denying the defendant's Petition for New Trial because of the errors hereinabove referred to and set rth, and also because (*a*) the evidence showed and the jury found that plaintiff was without the scope of his employment at the time he was injured, and that the defendant failed in no duty which it owed him while he was so acting without the scope f his employment. (*b*) The evidence showed and the jury found at plaintiff's violation of his orders was the proximate cause of his jury. (*c*) The evidence showed that at the time of his injury aintiff was acting in violation of the rules and orders of defendant, as in the commission of an unlawful act, and was without the scope f his employment. (*d*) The evidence showed no defect or inufficiency in any particular in the brakes on plaintiff's train due o the defendant's negligence. (*e*) Conceding that the evidence howed some defect or insufficiency in the brakes on plaintiff's train, notwithstanding, the evidence showed that such defect or insufficiency was not the proximate cause of plaintiff's injury. (*f*) The erdict returned by the jury in plaintiff's favor was inconsistent with

and contrary to the special findings made by the jury in response to the interrogatories submitted by the Court.

Tenth. The Court erred in rendering judgment against the defendant.

Wherefore, defendant prays that the aforesaid errors be corrected and the judgment of the District Court reversed, and that said Court be directed to set aside the judgment heretofore entered in plaintiff's favor, and enter judgment in defendant's favor, dismiss-
146-163 ing the action or of it be deemed that such relief is not grantable, that this cause be remanded for a new trial.

(Signed) GRAVES, KIZER & GRAVES,
Attorneys for Defendant.

Endorsements: Service of the within Assignments of Error is hereby acknowledged this 18th day of December, 1913. (Signed) Belden & Losey, Attorneys for Plaintiff. Assignments of Error. Filed in the U. S. District Court for the Eastern District of Washington, December 17, 1913. W. H. Hare, Clerk. By S. M. Russell, Deputy.

* * * * * * *

164 United States Circuit Court of Appeals for the Ninth Circuit.

No. 2366.

SPOKANE & INLAND EMPIRE RAILROAD COMPANY, a Corporation, Plaintiff in Error,
vs.
EDGAR E. CAMPBELL, Defendant in Error.

[*Opinion U. S. Circuit Court of Appeals.*]

Graves, Kizer & Graves, for Plaintiff in Error.
Belden & Losey and H. Lowndes Maury,
Henry R. Newton, of counsel, for Defendant in Error.

Before Gilbert and Ross, Circuit Judges, and Wolverton, District Judge.

On the afternoon of the 31st day of July, 1909, at about 4:30 o'clock, the defendant in error, plaintiff below, he being the motorman, started with his train of three cars—the motor car and two trailers—out of Cœur d'Alene over the electric line for Spokane. When he had proceeded a short distance from Cœur d'Alene, a mile and a half or two miles, he ran into another train coming in the opposite direction, whereby he was injured, and a number of passengers on his train lost their lives, while others were more
165 or less injured. The train he was running was a special, known as No. 5, and he testifies that he received written orders for running it; also oral orders from the conductor, and that he moved out on the line in pursuance of such orders; that when

had gotten out on the road some distance and observed the approaching train, he set the air-brakes, which held for a short time r, then let go, supposedly by the escape of the air, and he thereby control of his train, and was unable to stop it or further check speed. As a consequence he ran into the train coming from other way, the latter train, however, having been brought to a before the collision. In this testimony plaintiff has corrobora-

According to the rules of the company, which were in evidence, pecial train is expected to keep out of the way of the regular trains; t is to say; the special must take note of the schedule running e of all regular trains, and be on sidings at the stations where and en the regulars will pass, so as to allow a free track to the regulars. ecials are run on orders from the dispatcher with reference to other special, and the motorman is expected to make the passing tions as directed.

The defendant's testimony tends to show that plaintiff, together th the conductor, was given and received a running order for . 5 before leaving Cœur d'Alene station, directing No. 5 to meet . 4 at Alan station, which order was in the following language:

"Motor 5 will run Spl CD Alene to Spokane meet Spl 4 East at Alan."

6 And further that the train was equipped with air-brakes and other equipment for controlling and stopping the train, d that these had been properly and recently tested for determining eir efficiency, and found to be in good order.

The cause having been tried before a jury, the following special nd general verdicts were returned:

"Verdict.

"We, the jury in the above-entitled cause, find for the plaintiff, nd fix the amount of his damages at the sum of $7,500.00 (Seventy-ve Hundred Dollars)."

"Special Verdict.

"Did the plaintiff Campbell receive, before leaving Cœur d'Alene, rain order No. 53, reading as follows:

'Train Order No. 53.

From Spokane 7-31-1909.

To Motor 5 at C. D. Alene Station:

Motor 5 will run Spl. C. D. Alene to Spokane meet special 4 east at Alan.'

Yes."

"Special Finding I.

"Q. Were the air brakes on Campbell's train immediately before the collision insufficient to enable Campbell to control the speed of the train?

Answer. Yes."

"Special Finding II.

"If you find that plaintiff left Cœur d'Alene in violation of his orders, then answer this question: Was that leaving in violation of his orders the proximate cause of the accident?

Yes."

Motion was interposed for judgment in favor of defendant on the special findings, notwithstanding the general verdict, which was denied. Later a petition for a new trial was also denied, and judgment rendered for plaintiff. Error is prosecuted from this judgment.

167 WOLVERTON, *District Judge:*

Three questions are urged upon our attention:

First, whether the Safety Appliance Act of Congress has application to interstate electric railroads; it being contended that the defendant was not bound to equip its motors with air brakes.

Second, whether the trial court should have allowed the motion for judgment non obstante; and,

Third, whether the motion for new trial should have been granted.

Section 1 of the Safety Appliance Act of Congress, March 2, 1893, requires common carriers engaged in interstate commerce by railroad to equip their locomotive engines with power driving-wheel brakes and appliances for operating the train-brake system, and to equip a sufficient number of cars in the train with power or train brakes so that the engineer on the locomotive drawing such train can control its speed without requiring brakemen to use the common hand brake for the purpose. 27 Stat. 531. By an amendment of this statute (Act March 2, 1903, 32 Stat. 943) the provisions and requirements thereof relating to train brakes, automatic couplers, etc., are made to apply to all trains, locomotives, tenders, cars, and similar vehicles used on any railroad engaged in interstate commerce, and to all other locomotives, tenders, cars, and similar vehicles.

168 There can be no doubt that when the primary act was passed, electrically propelled trains were not within the legislative mind, and where "locomotive engine" occurs reference was had to a steam propelled engine. And likewise when "engineer" is spoken of, it had relation to a person in charge of a steam propelled locomotive. But this does not signify that other locomotive or motor engines, and that persons driving other motor cars, may not come within the scope and intendment of the act. The purpose of the legislature was to provide, among other things, for a more efficient and effective way of handling trains in interstate commerce, so that the speed and movement of the train might be regulated and controlled, and when desired, and in cases of emergency, readily brought to a stop, all from the engine and by the one person in charge of it, thereby to lessen the danger to employees and the public incident to the operation of railroads.

The electric railroad has since come into very general use, with its driving engines called motors, and its employees in charge of the engines are called motormen or enginemen. These railroads, not-

ithstanding, are common carriers of property and persons, the same
s steam railroads, and have employees and come into relation with
ne public in the same way, the only essential difference being that
ectricity has taken the place of steam as a propelling agency or
orce, with differently contrived engines, suited to the harnessing
of the propelling agency to the use desired, so that the broad
69 purpose of the legislature applies as completely to the one
kind of railroad as to the other. In a narrower sense, a
ocomotive engine is spoken of as an engine propelled by steam; but
hen the statute, as the amendment does, extends the provisions of
he act to apply to all trains, locomotives, tenders, cars and similar
ehicles used on any railroad engaged in interstate commerce, and
o all other locomotives, tenders, cars and similar vehicles, it broadens
he significance so as, without question, to include motors electrically
ropelled, used upon railroads engaged in interstate commerce. So
lso the original act, with its amendment, includes the operators of
uch engines, whether called engineers or motormen. We think the
tatute is broad enough to require that electrically propelled engines
nd trains engaged in interstate commerce, as well as steam propelled
ngines and trains, shall be equipped with air brakes for their ef-
icient operation and control.

The next question may be more clearly resolved by understanding
hat were the issues presented to the jury for their verdict. The
omplaint, so far as it is pertinent to the inquiry, alleges:

"4. That plaintiff on said date aforesaid was directed by the agents,
fficers and employees of said defendant to take his said train No. 5,
nd to proceed from said Town of Cœur d'Alene to the City of
Spokane, and that plaintiff was given orders, directing him to meet
nd pass Regular Train No. 20 at the Town of Allen; that when
ounding a curve and nearing the station of Gibbs, State of Idaho,
which is a point between Cœur d'Alene City, Idaho, and the Town
of Allen, this plaintiff saw a train coming from the opposite direction
nd running on the same track upon which said plaintiff's train was
running, which said train plaintiff is now informed and
170 believes was Regular Train No. 20.

"5. That upon the coming into view of said train No. 20, plaintiff used all due diligence to bring his motor upon said train No. 5 to a stop and standstill; that he duly applied the air brakes upon said motor, but owing to the defective condition of said air-brakes, which said condition was wholly unknown to plaintiff, said brakes wholly failed and refused to act, and plaintiff's said train continued to rush forward at a tremendous rate of speed and a collision occurred, plaintiff's said train colliding with said train No. 20, and which said collision caused the injuries hereinafter complained of.

"6. That said accident and collision was directly due to the wrongful and negligent acts of the plaintiff's said superiors in the giving of said wrongful orders, and in their failure to furnish this plaintiff with a motor and train supplied with proper air-brakes in working condition.

"7. That this plaintiff, after observing said train No. 20 upon

the track, had plenty of time to have stopped his said train and prevented said collision if said air-brakes had been in good condition and in proper working order."

These allegations were denied, and the defendant for further answer alleges:

"That on said July 31st plaintiff was acting as motorman upon a special train referred to and described in the orders of defendant as Motor 5. That under the rules and regulations of such company such special train had no rights over the regular trains operating under the time table of defendant, and was obliged to keep out of the way of such regular trains; that such special train had no right to go out upon the road when a regular train was due, unless it had telegraphic orders from defendant's train dispatcher in Spo-
171 kane ordering it to do so; that upon said date plaintiff, in charge as motorman of the special train aforesaid, was standing in defendant's yards at Cœur d'Alene ready to start upon a run to Spokane as soon as there should arrive at Cœur d'Alene one of defendant's regular trains, known on its time table as No. 20, which was then due; that defendant, knowing that No. 20 was then due and that he had no right to leave Cœur d'Alene until it had come in, received telegraphic orders from the dispatcher at Spokane to meet another special train at the town of Allan, and that when handing him such orders the conductor of plaintiff's train told him he might run farther down in the yards and wait there until No. 20 came in; that plaintiff started his train under such orders, but instead of stopping at the point in the yards where he had been directed to stop, continued on his way towards Spokane, passing out of the Cœur d'Alene yards and out on the line to Spokane, and at the Station of Gibbs, a distance of about one and one-half miles from Cœur d'Alene, his train came in collision with No. 20 on a straight track; that No. 20 was in full view of plaintiff's train for a distance of more than eight hundred feet before the collision occurred, and the motorman of No. 20, seeing plaintiff's train approaching, came to a full stop; that plaintiff could, if he had seen No. 20, have brought his train to a stop within a distance of 150 to 200 feet, and that the collision between the two trains was caused solely and entirely by plaintiff's disobedience of the rules, regulations and orders of the company and by his reckless conduct in failing to pay heed to his surroundings, and to keep a lookout upon the track ahead of him so as to observe No. 20 and bring his train to a stop, as he might have done had he have looked ahead of him at all."

The issues thus presented were, whether the plaintiff was directed by defendant to proceed with train No. *3*, which was special, out of Cœur d'Alene, and to meet regular train No. 20 at the town of Alan; whether the defendant failed to furnish the plaintiff with a motor and train supplied with proper air-brakes, in working condition; whether plaintiff used due diligence to bring his motor upon
172 train No. 5 to a stop by application of the air-brakes upon the motor; and whether, by reason of the defective condition of said air-brakes, plaintiff was unable to stop his train in time to prevent collision. And, as presented by the answer, whether, under

he rules and regulations of the defendant company in the operation f its train, the plaintiff operating a special was required to keep ut of the way of regular trains; whether plaintiff received orders rom defendant to meet another special train at Alan, and was irected by the conductor to run farther out in the yards, and there o wait until train No. 20 arrived in; and whether, in disobedience o these orders, he continued on his way, thus bringing on the col- ision.

A special verdict, where the entire controversy is dependent upon t, should necessarily find all the facts essential to a determination f the issues of the case. In those jurisdictions where both a special nd general verdict may be taken, the special verdict will prevail over he general, and this is perhaps the general rule. But this can only e so where the special verdict has been found respecting every material issue; otherwise the court could not be in a position to educe the conclusions of law necessary to a decision of the case.

It is strongly urged that the Federal courts will adopt the local practice with respect to the taking of special and general
173 verdicts and the local rules and procedure for construing the same in determining their potency and effect.

It has been distinctly held that the local law with respect to sub- mitting special findings along with a general verdict does not con- trol the Federal courts in respect to the mode in which causes shall e submitted to the jury.

Indianapolis etc. R. R. Co. v. Horst, 93 U. S. 291;
Mutual Accident Association v. Barry, 131 U. S. 100;
Toledo, St. L. & W. R. Co. v. Reardon, 159 Fed. 366.

This being so, it is a logical consequence that the Federal courts will not be found by the rules obtaining in local courts for interpret- ing such verdicts. The general rule with respect to this subject is, that the court, in determining what judgment shall be entered upon a special verdict, will not look to the evidence nor beyond the plead- ings and the judge's record. Mayor, etc., of Borough of Seabright v. New Jersey Cent., 60 Atl. 64. As said in Daube v. Philadelphia & R. Coal & Iron Co., 77 Fed. 713, 715:

"In determining the force of a special verdict or finding, only the facts found, unmodified by the statements of counsel or by reference to the evidence, can be considered."

The rule covering almost the exact controversy here is very well stated in Conwell v. Tri-City Ry. Co., 136 Iowa, 190, 191, a code state, as follows:

"On a motion for judgment as against a general verdict based on special findings, every issue raised by the pleadings and not elim- inated by the instructions will be presumed to have been
174 found for the party in whose favor the general verdict is returned, and it will be presumed that such findings are sup- ported by sufficient evidence; but the special findings cannot be added to or supported by the evidence, and must be given effect only so far as they necessarily negative the findings which might other- wise be assumed in support of the general verdict."

See also: Farmers Sav. Bank v. Forbes, 151 Iowa, 627; Drake v. Justice Gold Min. Co., 75 Pac. 912.

With this understanding of the law, we are to determine without reference to the testimony in the case whether from the special findings the court is able, as a matter of law, to conclude how the case should be decided, notwithstanding the general verdict. In this relation, we are also to consider the effect of the Employers' Liability Act upon the issues tendered for solution at the trial. This act provides, among other things, that in case of injury or death to an employee, contributing negligence on the part of the employee shall not bar a recovery, but that the damages shall be diminished in proportion to the amount of negligence attributable to such employee, and further that no such employee shall be held to have been guilty of contributory negligence in any case where the violation by such common carrier of any statute enacted for the safety of the employees contributed to the injury or death of such employee. 35 Stat. 66.

The effect of this statute is to eliminate the element of proximate cause, where concurring acts of the employer and employee contribute as a cause for the injury or death of the employee,
175 especially where the contributing act of the employer was in derogation of a duty imposed under the act for the safety of the employee. This is judicially declared in Grand Trunk Western Ry. Co. v. Lindsay, 201 Fed. 836, 844, where the court said:

"If, under the Employers' Liability Act, plaintiff's negligence, contributing with defendant's negligence to the production of the injury, does not defeat the cause of action, but only lessens the damages, and if the cause of action is established by showing that the injury resulted 'in whole or in part' from defendant's negligence, the statute would be nullified by calling plaintiff's act the proximate cause, and then defeating him, when he could not be defeated by calling his act contributory negligence. For his act was the same act, by whatever name it be called. It is only when plaintiff's act is the sole cause—when defendant's act is no part of the causation—that defendant is free from liability under the act."

To the same effect is Louisville & N. R. Co. v. Wene, 202 Fed. 887.

Now, turning to the special findings, the jury first found that the plaintiff received the train order No. 53. Then they found that the air-brakes on plaintiff's train immediately before the collision were insufficient to enable him to control the speed of the train. These findings, construed in the light of the pleadings, show that both the plaintiff and defendant were guilty of negligence, and the acts were concurring, leading to the plaintiff's injury. But this does not relieve the defendant, for, under the liability statute, the defendant acted in derogation of a statute enacted for the safety of the employee.

In view of this condition, the holding of the trial court is
176 especially pertinent as follows:

"A collision does not of necessity result from disobedience of orders on the part of an employee, and if the employee who has been guilty of such disobedience is unable to avoid an impending collision because of defective equipment furnished by the master it

rely can not be said that the defective equipment in no wise con-
ibuted to the accident. If it did contribute a liability exists under
e act in question." (The Employers' Liability Act).

The third special finding that the plaintiff's leaving Cœur d'Alene
violation of his orders was the proximate cause of the accident
as a mere conclusion of law, and not a finding of fact. The purpose
a special finding is to find the fact, so that the court may deduce
e legal conclusions and thus determine the controversy.

Further than this, the jury did not specially find as to all the
aterial issues pertinent to the inquiry under the pleadings.

We think there can be no question that the general verdict should
evail.

As it relates to the motion for a new trial and the action of the
ial court respecting the same, it is the established rule in courts of
ie United States that to grant or refuse a new trial rests in the
ound discretion of the court, and the result cannot be made the
ubject of reversal upon a writ of error. Newcomb v. Wood, 97
. S. 581, 583; Copper River & N. W. Ry. Co. v. Reeder, 211 Fed.
80.

The judgment will be affirmed.

[Endorsed:] Opinion. Filed Oct. 19 1914 [signed] F. D. Monck-
on, Clerk.

77 United States Circuit Court of Appeals for the Ninth Circuit.

No. 2366.

SPOKANE & INLAND EMPIRE RAILROAD COMPANY, a Corporation,
Plaintiff in Error,
vs.
EDGAR E. CAMPBELL, Defendant in Error.

Judgment.

In Error to the District Court of the United States for the Eastern
District of Washington, Northern Division.

This Cause came on to be heard on the Transcript of the Record
rom the District Court of the United States for the Eastern District
f Washington, Northern Division, and was duly submitted:

On Consideration Whereof, It is now here ordered and adjudged
y this Court, that the judgment of the said District Court in this
ause be, and hereby is affirmed, with costs in favor of the defendant
n error and against the plaintiff in error.

It is further ordered and adjudged by this Court that the defend-
ant in error recover against the plaintiff in error for his costs herein
expended and have execution therefor.

[Endorsed:] Judgment. Filed and Entered October 19, 1914.
[Signed] F. D. Monckton, Clerk.

178 United States Circuit Court of Appeals for the Ninth Circuit.

No. 2366.

SPOKANE & INLAND EMPIRE RAILROAD COMPANY, a Corporation, Plaintiff in Error,
vs.
EDGAR E. CAMPBELL, Defendant in Error.

Petition for Writ of Error.

Your petitioner, the Spokane & Inland Empire Railroad Company, plaintiff in error in the above entitled cause, respectfully shows that the above entitled cause is now pending in the United States Circuit Court of Appeals for the Ninth Circuit, and that a judgment therein rendered on October 19, 1914, affirming a judgment of the District Court of the United States, for the Eastern District of Washington, Northern Division, which judgment was in favor of the defendant in error and against the plaintiff in error for the sum of seventy-five hundred ($7500) dollars, interest and costs. Your petitioner further shows that in the affirmance of such judgment the said Circuit Court of Appeals for the Ninth Circuit committed sundry and divers errors prejudicial to the plaintiff in error and in denial of its rights, a review of which by this honorable court is desired by the plaintiff in error. And your petitioner further shows that the matter in controversy in this cause exceeds one thousand ($1000) dollars, besides costs, and that the jurisdiction of none of the courts mentioned is or was dependent in anywise upon the opposite parties to the suit or controversy, being aliens and citizens of the United States or citizens of different states, and the cause does not arise under the patent laws, under the copy-

179 right laws, under the revenue laws, or under the criminal laws, and it is not an admiralty case, and it is therefore a proper case to be reviewed by the Supreme Court of the United States upon writ of error.

Wherefore, your petitioner respectfully prays that a writ of error be allowed it in the above entitled cause, directing the clerk of the United States Circuit Court of Appeals for the Ninth Circuit to send the records and proceedings in said cause with all things concerning the same, to the Supreme Court of the United States, in order that the errors complained of in the assignments of error heretofore filed by said plaintiff in error in said Circuit Court of Appeals for the Ninth Circuit may be reviewed and if error be found, corrected according to the laws and customs of the United States.

SPOKANE & INLAND EMPIRE
RAILROAD COMPANY,
By GRAVES, KIZER & GRAVES,
Its Attorneys.

The foregoing petition is granted and writ of error allowed as prayed, upon plaintiff's giving bond according to law in the sum of Fifteen thousand Dollars, same to operate as a supersedeas.

Dated this fifth day of December, 1914.

JOSEPH McKENNA,
Justice of the Supreme Court of the United States.

[Endorsed:] Petition for and Order Allowing Writ of Error, and Fixing Amount of Bond on Writ of Error from Supreme Court U. S. Filed Dec. 12, 1914. Frank D. Monckton, Clerk U. S. Circuit Court of Appeals for the Ninth Circuit; By [signed] Meredith Sawyer, Deputy Clerk.

180 United States Circuit Court of Appeals for the Ninth Circuit.

No. 2366.

SPOKANE & INLAND EMPIRE RAILROAD COMPANY, a Corporation, Plaintiff in Error,
vs.
EDGAR E. CAMPBELL, Defendant in Error.

Assignments of Error.

Plaintiff in error, Spokane & Inland Empire Railroad Company, says that in the record and proceedings as aforesaid of the United States Circuit Court of Appeals for the Ninth Circuit in the above entitled cause and in the rendition of the final judgment therein, manifest error has intervened to the prejudice of the plaintiff in error in this, to-wit:

First. The said Circuit Court of Appeals erred in rendering judgment affirming the judgment of the District Court of the United States for the Eastern District of Washington, Northern Division, which judgment was rendered on August 15, 1913, and was in favor of the defendant in error, Edgar E. Campbell, and against the plaintiff in error, Spokane & Inland Empire Railroad Company, in the sum of Seventy-five Hundred ($7500) dollars, together with interest and costs.

Second. The said Circuit Court of Appeals erred in not reversing said judgment aforesaid as prayed by plaintiff in error.

Third. The said Circuit Court of Appeals erred in not sustaining the first specification of error relied upon by the plaintiff in error as cause for reversal of the judgment of the said District Court which said first specification was that the District Court erred in
181 denying the motion of plaintiff in error for judgment upon the special findings of the jury, notwithstanding the general verdict returned by the jury in favor of the defendant in error.

Fourth. The said Circuit Court of Appeals erred in not sustaining the second specification of error relied upon by the plaintiff in

error as cause for reversal of the judgment of the District Court, which second specification of error was that the District Court erred in charging the jury as follows:

"If on the other hand you find from a preponderance of the testimony that the air brakes of the car and train operated by the plaintiff were defective and out of repair at and immediately prior to the time of the collision and that the defective condition of the air brakes was a direct and proximate cause of the collision or contributed directly or approximately to the collision and to the injury of the plaintiff, your verdict will be for the plaintiff."

Fifth. The said Circuit Court of Appeals erred in not sustaining the third specification of error relied upon by the plaintiff in error as cause for reversal of the judgment of the said District Court, which specification of error was that the District Court erred in submitting to the jury the question of whether the air brakes upon the train which the defendant in error was operating at the time of his injury, were defective or insufficient.

Sixth. The said Circuit Court of Appeals erred in not sustaining the fourth specification of error relied upon by the plaintiff in error as cause for reversal of the judgment of the said District Court, which specification of error was that the District Court erred in charging the jury as follows, directly after stating to them that the question for their consideration was whether the defendant in error took a train out in violation of his written orders, namely:

"The next question for your consideration will be this: 'Were the air brakes on this motor and train defective?' If you find from a preponderance of the testimony that they were, the next question is: 'Was such defect the direct and proximate cause of the injury to the plaintiff?' If you are satisfied on both of
182 these questions, or if you answer both of these questions in the affirmative, your verdict will be for the plaintiff and it only remains to assess the amount of his recovery."

Seventh. The said Circuit Court of Appeals erred in not sustaining the fifth specification of error relied upon by the plaintiff in error as cause for reversal of the judgment of the said District Court, which specification of error was that the District Court erred in refusing to charge the jury at the request of the plaintiff in error as follows:

"I charge you that if the plaintiff left Cœur d'Alene in violation of the orders which he had, recklessly or wilfully, or with such gross negligence as would amount to recklessness or willfulness, that then and in that event, the fact that the brakes did not work, if you find they did not, would be a wholly immaterial circumstance. Under those circumstances the plaintiff could not rely on the brakes and in that event your verdict should be for the defendant."

Eighth. The said Circuit Court of Appeals erred in not sustaining the sixth specification of error relied upon by plaintiff in error as cause for reversal of the judgment of the said District Court, which specification of error was that the District Court erred in refusing to charge the jury at the request of plaintiff in error, as follows:

"If you find from the evidence that the plaintiff left Cœur d'Alene

and proceeded on his way to Spokane without receiving written orders from the train dispatcher, fixing some point where he was to meet No. 20, he cannot recover. The fact that when he discovered the presence of No. 20 upon the track and endeavored to apply the brake, that the brake failed to work, if you find such to be the case, would not constitute actionable negligence on the part of the defendant."

Ninth. The said Circuit Court of Appeals erred in not sustaining the seventh specification of error relied upon by plaintiff in error as cause for reversal of the judgment of the said District Court, which specification in error was that the District Court erred in refusing to charge the jury as requested by plaintiff in error, as follows:

183 "If you find that before leaving Cœur d'Alene plaintiff received train order No. 53 reading as follows: "Train Order No. 53. From Spokane, 7-31-1909. To Motor 5 at C. D. Alene Station. Motor 5 will run Spl. C. D. Alene to Spokane, meet Special 4 East at Alan; and left Cœur d'Alene after receiving and reading and knowing the contents of said order and proceeded on his way to Spokane until he came in sight of No. 20, then I charge you to find for the defendant."

Tenth. The said Circuit Court of Appeals erred in not sustaining the eighth specification of error relied upon by plaintiff in error as cause for reversal of the judgment of the said District Court, which specification of error was that the District Court erred in entering judgment in favor of the defendant in error.

Eleventh. The said Circuit Court of Appeals erred in holding that the provisions of Section 1 of the Safety Appliance Act requiring common carriers engaged in interstate commerce by railroad to equip their locomotive engines with power driving-wheel brakes, etc., were applicable to the electric train which the defendant in error was operating at the time of his injury.

Twelfth. The said Circuit Court of Appeals erred in holding that the special findings returned by the jury were not in conflict with the general verdict and did not require the entry of judgment in favor of the plaintiff in error, notwithstanding the general verdict in favor of the defendant in error.

Thirteenth. The said Circuit Court of Appeals erred in holding that the act of the defendant in error in leaving Cœur d'Alene, his terminal point, in violation of his orders was not the proximate cause of his injury.

Fourteenth. The said Circuit Court of Appeals erred in failing to notice and to pass upon the contention made by the plaintiff in error that the defendant in error at the time of his injury was not within the scope of his employment in that he was acting in violation of his duty and of his orders, and that therefore no duty which the plaintiff in error owed him under such conditions was breached.

184–189 Fifteenth. The said Circuit Court of Appeals erred in failing to notice and to decide the contention of the plaintiff in error that there was no evidence that the air brakes upon

the train which defendant in error was operating at the time he was injured were defective, out of repair, or in anywise insufficient.

Sixteenth. The said Circuit Court of Appeals erred in failing to notice the propositions of law which were advanced by the plaintiff in error as cause for a new trial and in holding that a motion for a new trial, though it is based upon claimed errors in law occurring during the course of the trial, is in the discretion of the trial judge and may not be interfered with by the appellate court.

Wherefore, said Spokane & Inland Empire Railroad Company, plaintiff in error, prays that for the errors aforesaid and other errors appearing in the record of said United States Circuit Court of Appeals in the above entitled cause to the prejudice of the plaintiff in error, that the said judgment of the said United States Circuit Court of Appeals be reversed, annulled and for naught held and that said cause be remanded to the United States District Court for the Eastern District of Washington, Northern Division, with instructions to enter judgment in favor of plaintiff in error; that the defendant in error take nothing by its said action; that plaintiff in error go hence without day and recover its costs, or if for any cause it shall be deemed that such relief is not grantable, that the cause be so remanded with instructions to grant a new trial, and for such further proceedings therein as may be determined upon by this honorable court to the end that justice may be done in the premises.

Dated this 9th day of November, 1914.

(Signed) W. G. GRAVES,
GRAVES, KIZER & GRAVES,
Attorneys for Plaintiff in Error.

[Endorsed] Assignments of Error. Filed Nov. 14, 1914. F. D. Monckton, Clerk.

190 UNITED STATES OF AMERICA, *ss:*

The President of the United States to the Honorable the Judges of the United States Circuit Court of Appeals for the Ninth Circuit, Greeting:

Because in the record and proceedings, as also in the rendition of the judgment of a plea which is in the said Circuit Court of Appeals before you, or some of you, between Spokane & Inland Empire Railroad Company, a corporation, plaintiff in error, and Edgar E. Campbell, defendant in error, a manifest error hath happened, to the great damage of the said plaintiff in error, as by its complaint appears. We being willing that error, if any hath been, should be duly corrected, and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you have the same in the said Supreme Court at Washington, within 60 days from the date hereof, that the record and proceedings aforesaid being inspected, the said Supreme Court may cause further

to be done therein to correct that error, what of right, and according to the laws and customs of the United States should be done.

Witness the Honorable Edward D. White, Chief Justice of the United States, the fifth day of December, in the year of our Lord one thousand nine hundred and fourteen.

[Seal of the Supreme Court of the United States.]

JAMES D. MAHER,
Clerk of the Supreme Court of the United States.

Allowed by
JOSEPH McKENNA,
Associate Justice of the Supreme Court of the United States.

191–193 [Endorsed:] Docketed. No. 2366. United States Circuit Court of Appeals for the Ninth Circuit. Writ of Error from Supreme Court U. S. Original. Filed Dec. 12, 1914. Frank D. Monckton, Clerk U. S. Circuit Court of Appeals, for the Ninth Circuit. By Meredith Sawyer, Deputy Clerk.

Return to Writ of Error.

The answer of the Judges of the United States Circuit Court of Appeals for the Ninth Circuit to the within Writ of Error.

As within we are commanded, we certify under the Seal of our said Circuit Court of Appeals, in a certain schedule to this writ annexed, the record and all proceedings of the plaint whereof mention is within made, with all things touching the same, to the Supreme Court of the United States, within mentioned, at the day and place within contained.

December 23, 1914.

By the Court:

[Seal United States Circuit Court of Appeals, Ninth Circuit.]

F. D. MONCKTON,
Clerk of the United States Circuit Court of Appeals for the Ninth Circuit.
By MEREDITH SAWYER,
Deputy Clerk.

[United States internal revenue documentary stamp, series of 1914, ten cents, canceled Dec. 23, 1914. F. D. M. by M. S.]

194 In the Supreme Court of the United States, October Term, 1914.

No. 772.

SPOKANE & INLAND EMPIRE RAILROAD COMPANY, Plaintiff in Error,
vs.
EDGAR E. CAMPBELL, Defendant in Error.

Stipulation Concerning Printing of Record.

It is stipulated between the attorneys for plaintiff in error and for the defendant in error that the following portions of the record only need be printed, as such portions of the record contain all that is essential to a consideration of the errors assigned herein, to-wit

1. The third amended complaint upon which the case was tried in the trial court, the same appearing at pages 1 to 5, inclusive, of the record.

2. The answer to the third amended complaint, which appears upon pages 5 to 13, inclusive, of the record.

3. The reply to such answer, which appears upon pages 14 to 19, inclusive, of the record.

4. The general verdict and the special verdict or findings returned by the jury in the trial court, which appear upon pages 21 to 23, inclusive, of the record.

5. The motion of plaintiff in error for judgment notwithstanding the verdict, which appears upon pages 23 to 24, inclusive, of the record.

195 6. The order denying the motion of plaintiff in error for judgment notwithstanding the verdict, which appears upon pages 32 to 33, inclusive, of the record.

7. The petition of plaintiff in error for a new trial, which appears upon pages 33 to 37, inclusive, of the record.

8. The order denying the petition of plaintiff in error for a new trial, which appears upon page 44 of the record.

9. The judgment of the District Court in favor of defendant in error and against plaintiff in error, which appears upon pages 45 to 47, inclusive, of the record.

10. The bill of exceptions, which appears upon pages 48 to 140, inclusive, of the record.

11. The assignments of error relied upon on the prosecution of the writ of error to the Circuit Court of Appeals for the Ninth Circuit, which appear upon pages 141 to 146, inclusive, of the record.

12. The opinion and judgment of the Circuit Court of Appeals for the Ninth Circuit affirming the judgment of the District Court.

13. The assignment of errors in aid of the writ of error sued out from the Supreme Court to the Circuit Court of Appeals for the Ninth Circuit.

14. The petition for writ of error running from the Supreme

Court to the Circuit Court of Appeals for the Ninth Circuit and the allowance thereof.

Dated April 23, 1915.

WILL G. GRAVES,
Attorney for Plaintiff in Error.
BELDEN & LOSEY AND
H. L. MAURY,
Attorney- for Defendant in Error.

196 [Endorsed:] 772-2416. In the Supreme Court of the United States. No. 772. October Term, 1914. Spokane & Inland Empire Railroad Company, plaintiff in error, vs. Edgar E. Campbell, defendant in error. Stipulation concerning printing of record. Will G. Graves, attorney for plaintiff in error, Spokane, Washington.

197 [Endorsed:] File No. 24,516. Supreme Court U. S., October term, 1914. Term No. 772. Spokane & Inland Empire Railroad Co., pl'ff in error, vs. Edgar E. Campbell. Stipulation as to parts of record to be printed. Filed April 28, 1915.

Endorsed on cover: File No. 24,516. U. S. Circuit Court of Appeals, 9th Circuit. Term No. 325. Spokane & Inland Empire Railroad Company, plaintiff in error, vs. Edgar E. Campbell. Filed January 15th, 1915. File No. 24,516.

IN THE

SUPREME COURT

OF THE

United States

October Term, 1915

No. 328

SPOKANE & INLAND EMPIRE RAILROAD COMPANY, Plaintiff in Error,

vs.

EDGAR E. CAMPBELL, Defendant in Error.

In Error to the United States Circuit Court of Appeals for the Ninth Circuit.

BRIEF FOR PLAINTIFF IN ERROR

W. G. GRAVES,
Attorney for Plaintiff in Error.

F. H. GRAVES,
R. H. KIZER,
Of Counsel.

SUNSET PRINTING CO., SPOKANE

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IN THE

SUPREME COURT

OF THE

United States

October Term, 1915
No. 325

SPOKANE & INLAND EMPIRE RAILROAD COMPANY, Plaintiff in Error,

vs.

EDGAR E. CAMPBELL, Defendant in Error.

In Error to the United States Circuit Court of Appeals for the Ninth Circuit

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BRIEF FOR PLAINTIFF IN ERROR

Note: In this brief plaintiff in error will be referred to as the Company, and the defendant in error by his

name. Figures in brackets are page references to transcript.

STATEMENT OF THE CASE.

Campbell, formerly a motorman in the Company's employ, commenced this action in the United States District Court, Eastern District of Washington, to recover damages for personal injuries sustained by him through alleged violations by the Company of the Federal Employer's Liability and Safety Appliance Acts. Federal jurisdiction was invoked solely because of the character of the action. A judgment in his favor rendered in the District Court was affirmed by the Circuit Court of Appeals for the Ninth Circuit (*Spokane & I. E. R. Co. v. Campbell,* 217 Fed., 518), and the case is now here on writ of error.

At the time of Campbell's injury the Company was operating a single track electric railway between Spokane, Washington, and Coeur d'Alene, Idaho. It was operated under standard railroad rules. The running time of its regular trains was fixed by a time table, upon which they were designated by num-

bers. Special trains were run by telegraphic orders given by a train dispatcher, whose office was in Spokane. Regular trains were superior to special trains, and specials were required to look out for and keep out of the way of the regulars. Unless a special train had orders from the train dispatcher fixing a meeting point with a regular train, or in some other way giving it a right to disregard the time when the regular train was due according to the time table, it was required to clear the time of the regular train by five minutes; that is, to be clear of the main line at any point five minutes before the regular train was due at that point according to the time table. (18, 20-22, 35, 37-39.) Campbell was an experienced motorman, had been in the Company's employ for several years, and was thoroughly conversant with its rules and its method of train operation (18, 21).

The day that Campbell was injured he was the motorman in charge of a special train running between Spokane and Coeur d'Alene. It was made up of a combined motor- and passenger-car and two trailers, and was referred to in the train orders as "Motor 5", that being the number of the motor-car. After several trips between the two points, it was at

Coeur d'Alene about four o'clock in the afternoon, ready to start for Spokane when it should be ordered to do so. Two trains were then on the way from Spokane to Coeur d'Alene; the first, or nearer to Coeur d'Alene, being a regular train designated on the time table and referred to in the testimony as "Number 20"; the second being a special train referred to in the train orders and testimony as "Special 4 east". Number 20 was 15 or 20 minutes late, was already over due at Coeur d'Alene, and its arrival there was momentarily expected. Under the rules heretofore referred to, Campbell's train could not leave Coeur d'Alene until Number 20 came in unless the train dispatcher gave orders fixing a meeting place with it. The regular train lost no right by being late, the special being required to wait for it (39). This was admitted by Campbell (20).

At this juncture the conductor of Campbell's train handed Campbell, who was sitting in his cab, running orders from the train dispatcher, the nature of which was in dispute. Campbell testified that the order was that Motor 5 should run special Coeur d'Alene to Spokane and meet Number 20 at Alan, a station several miles out of Coeur d'Alene (18, 25). If that

were the order, Campbell was justified in at once leaving Coeur d'Alene and running to Alan, the order giving him a right of way over all trains to that point. But the testimony of the dispatcher and the conductor, of a half dozen other persons who saw the order or copies of it, and the evidence of the dispatcher's train order book and the three copies of the order (including the one given Campbell) which under the rules of the Company were made by the telegraph operator at Coeur d'Alene, where it was received, were that no such order was given; that the order was that Motor 5 should run special from Coeur d'Alene to Spokane and meet Special 4 east at Alan; quoting its precise language: "Motor 5 will run spl C d'Alene to Spokane meet spl 4 East at Alan". The jury, by a special finding upon the point, found that that was the order Campbell received (11). That order, admittedly, did not authorize Motor 5 to leave Coeur d'Alene before Number 20 came in, for it made no mention of Number 20 and did not supersede the superior right given to it by rules and time table. Campbell admitted that only an order giving him some right against Number 20 would have justified him in leaving Coeur d'Alene; basing the rightfulness of his action in leaving upon

the order being as he testified (18, 20).

After Campbell received and read the order, the conductor, he testified, said to "go ahead; get out of town". He did not claim that the conductor had the right to give him any order of that kind, or that it would warrant him in pulling out if the dispatcher's order did not warrant it. On the contrary he testified: "The conductor is my superior, but he cannot give you orders to pull out unless you have orders to pull out" (18). As matter of fact, Campbell's responsibility for the proper handling of the train was equal to the conductor's. The rules, concerning which Campbell had successfully passed a written examination (21), and which he testified he thoroughly understood, placed as much responsibility for the protection of the train upon the motorman as upon the conductor (36). And Campbell testified that "When a motorman running a special train is not given orders about regular trains, then he must himself look out for them" (20). Whittlesey, the conductor, substantially corroborated Campbell, saying that after Campbell read the order he said "All right, are you ready?", and that he (Whittlesey) said "Yes, let her go", and that Campbell started the train and

he got on board and commenced taking up tickets, paying no further attention to the train's movements until he felt the air applied just before the collision which occurred a little outside Coeur d'Alene (34). It seems there was a land registration going on at Coeur d'Alene at the time, and because of the resultant rush of travel, trains coming into Coeur d'Alene during that period stopped at the west, or Spokane end, of the yard, and went on a wye switch where the train was turned and backed down to the depot (31, 32, 33, 39). Trains which were ready to go out as soon as an incoming train arrived, used, during this period, to run down to the end of the yard, between the legs of the wye switch, wait there for the in-coming train, and pull out as soon as it had passed on the switch (34, 39). Whittlesey testified that he intended the train to go to the wye and wait for Number 20; that he supposed Campbell was just running down to the wye, and that was the reason he paid no attention to the movement of the train, supposing Campbell would stop there. To quote:

> "After he left the station at Coeur d'Alene until I felt the brakes come on, I didn't pay any attention to what Campbell was doing. It was

> my duty to have seen that Campbell stopped at the wye, but I didn't do so, and I was discharged by the company because I did not, and have not been in the employ of the company since. I supposed Campbell would look out for it. He had been. No. 20 was overdue when we left Coeur d'Alene. Anyone where my train was could see she was not in, and I knew it was not in. It was Campbell's duty and mine not to leave Coeur d'Alene under that order until No. 20 was in, and to do so before No. 20 was in was a direct violation of all the rules of railroading." (35.)

Because, as Campbell testified, his orders were to go to Alan to meet Number 20, he did not stop at the wye. He testified that after passing the wye he looked at the time table to see where he would meet Number 22, another regular train, fixed his cushions so he would be more comfortable, and then as he looked up saw Number 20 coming. He immediately "dynamited her", which, being translated from expressive railroadese into ordinary language, means that he suddenly and violently applied all the braking power in the air reservoirs. He claimed that the brakes took hold properly, held for a very brief space, and then released. Why they should have done so if they were properly applied is unaccountable, for the air brakes were of standard Westinghouse make, were apparently in perfect condition, and had worked

perfectly up to that moment (18, 20, 24). Because, as Campbell claimed, the brakes did not work, the train came in collision with Number 20, which had been almost brought to a stop. In the collision eighteen persons were killed and a number injured, and the Company was cast in damages for between $300,000 and $400,000 (7). Campbell was among the injured, and the judgment before the Court for review was for damages for his injuries.

The trial judge submitted several interrogatories to the jury, under the State practice, to which answers were made, the jury at the same time returning a general verdict for the plaintiff (Campbell). The Company thereupon moved for judgment upon the ground that the special findings were inconsistent with the general verdict, and entitled it to judgment (13). The motion was denied (13), as likewise was the Company's subsequent petition for a new trial, and judgment was entered on the general verdict (16). The judgment was affirmed by the Circuit Court of Appeals (64-71); *Spokane & I. E. R. Co. v. Campbell,* 217 Fed., 518.

SPECIFICATIONS OF ERROR.

There was error:

First. In denying the Company's motion for judgment upon the jury's special findings notwithstanding the general verdict.

Second. In refusing to give the following instructions, which were requested by the Company:

> "If you find from the evidence that the plaintiff left Coeur d'Alene and proceeded on his way to Spokane without receiving written orders from the train dispatcher fixing some point where he was to meet No. 20, he cannot recover. The fact that when he discovered the presence of No. 20 upon the track and endeavored to apply the brake, that the brake failed to work, if you find such to be the case, would not constitute actionable negligence on the part of the defendant."
>
> "If you find that before leaving Coeur d'Alene plaintiff received train order No. 53 reading as follows:
>
> 'Train Order No. 53.
>
> From Spokane 7-31-1909.
>
> To Motor 5 at C. D. Alene station:
>
> Motor 5 will run Spl C D Alene to Spokane meet special 4 east at Alan'
>
> and left Coeur d'Alene after receiving and reading and knowing the contents of said order and proceeded on his way to Spokane until he came in sight of No. 20, then I charge you to find for the defendant."
>
> "I charge you that if the plaintiff left Coeur d'Alene in violation of the orders which he had, recklessly, or wilfully, or with such gross negli-

gence as would amount to recklessness or wilfulness, that then and in that event the fact that the brakes did not work, if you find they did not, would be a wholly immaterial circumstance. Under those circumstances the plaintiff could not rely upon the brakes, and in that event your verdict should be for the defendant." (52, 57-58.)

Third. In instructing the jury as follows:

"If, on the other hand, you find from a preponderance of the testimony that the air brakes on the car and train operated by the plaintiff were defective and out of repair at and immediately prior to the time of the collision, and that the defective condition of the air brakes was the direct and proximate cause of the collision, or contributed directly and proximately to the collision, and to the injury to the plaintiff, your verdict will be for the plaintiff."

"The next question for your consideration will be this: Were the air brakes on this motor and train defective? If you find from a preponderance of the testimony that they were, the next question is, was such defect the direct and proximate cause of the injury to the plaintiff? If you are satisfied on both of these questions, or if you answer both of these questions in the affirmative, your verdict will be for the plaintiff, and it only remains to assess the amount of his recovery." (54, 57.)

DIVISION OF ARGUMENT.

Three of the points which we shall urge arise under

the assignment of error in denying the defendant's motion for judgment upon the special findings. If the legal principles upon which they are based are sound, the special findings made by the jury are inconsistent with the general verdict for the plaintiff, and require that judgment be ordered for the defendant. Two other points go merely to errors in the submission of the case to the jury, and if sustained will only warrant the granting of a new trial. We therefore divide our argument into two heads: the first dealing with the points relied upon to secure an order directing judgment for the defendant; the second with those relied upon as cause for a new trial.

First Head.

The findings under consideration were submitted under a statute of Washington reading as follows:

> "The verdict of a jury is either general or special. A general verdict is that by which the jury pronounces generally upon all or any of the issues either in favor of the plaintiff or defendant. A special verdict is that by which the jury find the facts only, leaving the judgment to the court."
>
> "In every action for the recovery of money only, or specific real property, the jury, in their

discretion, may render a general or special verdict. In all other cases, the court may direct the jury to find a special verdict in writing upon all or any of the issues, and in all cases may instruct them, if they render a general verdict, to find upon particular questions of fact to be stated in writing and may direct a written finding thereon. The special verdict or finding shall be filed with the clerk and entered in the minutes."

"When a special finding of facts shall be inconsistent with the general verdict, the former shall control the latter, and the court shall give judgment accordingly."

1 Rem. & B. Ann. Code, §§362, 364, 365.

We pause for a brief consideration of the practice under the statute, in aid of our claim that judgment should have been entered for defendant upon the special findings.

The statute, it will be noted, distinguishes between a special verdict and special findings on some issues, and provides that a general verdict shall be controlled by special findings. A special verdict is rarely, if ever, directed under the State practice; when more than the general verdict is desired, findings on a few ultimate, and supposedly controlling, facts are ordered by the trial court. Since it is not the practice to resort to special verdicts, and since special findings,

because they do not cover all the facts in the case, are liable to misconstruction if considered alone, the Supreme Court of the State has uniformly held that special findings returned under the above statutes "must be read in the light of all the testimony, the issues involved therein, and the evident understanding of the jury in making answer". *Sudden v. Morse*, 55 Wash., 372. In another case it was held that where, upon the return of a verdict and special findings, attention was called to a possible inconsistency, the intention of the jury, as then stated by its foreman, could be considered in determining the meaning and effect of the findings. *Cameron v. Lumber Co.*, 68 Wash., 543. That the entire record, evidence as well as issues, should be examined in order to arrive at the meaning of findings has never been questioned. *Mercier v. Insurance Co.*, 24 Wash., 154; *Hobert v. Seattle*, 32 Wash., 332; *Abby v. Wood*, 43 Wash., 379; *Crowley v. Railroad Co.*, 46 Wash., 85; *Evans v. Railroad Co.*, 58 Wash., 434. Where the findings show that the general verdict was returned without warrant in law or of fact, it will be set aside and judgment ordered in accordance with the findings. *Pepperall v. Transit Co.*, 15 Wash.,

176; *Hobert v. Seattle*, 32 Wash., 330; *Crowley v. Railroad Co.*, 46 Wash., 85.

We have remarked so much at length upon the construction of the statute by the Supreme Court of the State, and the consequent settled practice of the State, because the Circuit Court of Appeals brushed the special findings aside as of no value on the theory that a special *verdict* must find "all the facts essential to a determination of the case", and must be "found respecting every material issue", otherwise it will not control a general verdict. It refused to read the findings and consider their effect upon the general verdict in the light of the entire record in the case upon the authority of *Mayor, etc., v. Railroad Co.* (N. J.), 60 Atl., 64, which holds that "In determining what judgment shall be entered upon a special verdict, nothing can be looked at by the court except the pleadings and the postea"; citing *Tidd's* and *Archbold's Practice*. More conclusive authority as to the common law rule governing special verdicts could not be desired, but the Court overlooked that it was required to consider, not a special verdict covering all the facts in the case, but special findings covering a few vital issues, and that it was not re-

quired to declare the common law practice, but the practice in a new commonwealth as settled by its practice code and the decisions of its Supreme Court construing the code. Section 914 of the Revised Statutes was designed to permit Federal courts to apply the laws of the communities in which they were sitting, and to obviate the necessity for following the little known and often repugnant laws of another community. *Indianapolis, etc. Co. v. Horst*, 93 U. S., 299, 300. True, as held in the case just cited, a State statute does not, under the provisions of §914, control the *mode* of submitting a cause to the jury in a Federal court. But after a cause has been submitted to the jury, the practice in returning the verdict, the effect of the verdict, and all related matters of practice, are controlled by the State statutes. Thus, a State statute providing that a verdict returned on several counts shall not be set aside if one count is sufficient, governs in the trial of cases in a Federal court. *Bond v. Dustin*, 112 U. S., 604. "The sufficiency and scope of pleadings, and the form and effect of verdicts, in actions at law", are governed by the practice of the State. *Glenn v. Sumner*, 132 U. S., 152, 156. The circumstances under which

compulsory non-suits may be entered are determined by the State practice. *Central Transp. Co. v. Pullman Co.*, 139 U. S., 24; *Caughran v. Bigelow*, 164 U. S., 301. The form and effect of verdicts, and the mode of entering and recording judgments, including provisions for entering judgments against one or more defendants, are determinable by the State statutes. *Knight v. Railroad Co.*, 180 Fed., 368.

Furthermore, under §721, R. S., a Federal court will accept the laws and decisions of the State where it is sitting as rules of decision in the absence of a countervailing Federal law or decisions. For illustration, *Beecher v. Railroad Co.*, 125 U. S., 555; *Camden, etc. Co. v. Stetson*, 177 U. S., 172; *Missouri, etc. Co. v. Krumseig*, 172 U. S., 355.

The District Court was under no obligation to submit questions to the jury for its findings thereon. But it chose to do so, and received and considered the findings. Since the findings thereby became essentially related to the general verdict, and might, according to their construction, control the verdict, it is manifest that verdict and findings should be construed together as required by the statute which authorized them, and in accordance with the prac-

tice of the State where the Court was sitting, and not the practice of the common law.

In asking that the findings be construed in the light of the entire record, and if, their meaning ascertained, they are seen to be inconsistent with the general verdict that judgment be ordered as they require, we in no way run counter to *Slocum v. Insurance Co.*, 228 U. S., 364. We do not ask the Court to usurp the jury's function and weigh the evidence, but merely to construe the jury's findings in the light of the pleadings and evidence, if that shall appear necessary, and then determine as matter of law the judgment they require, as authorized by the State statute. Authority for the request is found in *Walker v. Railroad Co.*, 165 U. S., 593.

(a) *The jury's findings establish that Campbell was not in the course of his employment when he was injured, and consequently judgment could not be entered for him upon the cause of action pleaded and established by the general verdict.*

The cause of action pleaded is that Campbell, while employed as a motorman by the Company and in

charge of one of its trains, was ordered to take his train from Coeur d'Alene, Idaho, to Spokane, Washington, meeting and passing train Number 20 at Alan, and that he was injured by reason of his train coming in collision with Number 20 between Coeur d'Alene and Alan (1-2). The answer joined issue upon the nature of his order, denying that he had an order against Number 20, and averring that he left Coeur d'Alene in violation of his orders and thereby brought his train in collision with Number 20 (5-6). The same flat conflict is carried into the evidence; Campbell testifying that his order was to meet Number 20 at Alan, while all the other evidence upon the point was that he had no order against Number 20, but that his order was to meet Special 4 East at Alan. Admittedly but one order was given Campbell, and it was either what he testified or what the other evidence showed. By submissions and findings one and three, the jury found upon those issues as follows (11-12):

> "Did the plaintiff Campbell receive, before leaving Coeur d'Alene, train order No. 53, reading as follows:

'Train Order No. 53.
From Spokane 7-31-1909.

To Motor 5 at C. D. Alene Station.

Motor 5 will run Spl C. D. Alene to Spokane meet special 4 east at Alan.'

"Yes."

* * * * *

"If you find that plaintiff left Coeur d'Alene in violation of his orders, then answer this question: Was that leaving in violation of his orders the proximate cause of the accident?

Yes."

Those findings require no construction. By his pleading as unequivocally as by his evidence, Campbell based his right to be where he was when he was injured upon the receipt of an order to meet Number 20 at Alan. He admitted that if he had no such order he was wrongfully where he was injured. The jury found unequivocally that he had no such order, and that the proximate cause of his injury was his act in leaving Coeur d'Alene in violation of his orders. The question is therefore squarely presented: May a railroad employe who takes a train out upon a single track railroad in violation of his orders, and when he knows a train is approaching from the opposite direction, claim to be within his employment

and entitled to recover damages from his employer for his resultant injury under any Federal Act?

It will not be questioned, we assume, that the Federal Acts involved were only intended for the protection of railroad employes while they are engaged in their work; while they are furthering their employers' interests and doing the work they have been set to do. An employe may, of course, momentarily step aside from his duties for some personal purpose without losing the character of an employe, provided the brief divagation is not "at all out of the ordinary", or "inconsistent with his duty to his employer". *North Car. R. Co. v. Zachary*, 232 U. S., 248, 260. But those Acts were not intended to change the established rule that "where a duty is imposed for the protection of persons in particular situations or relations a breach of it which happens to result in injury to one in an altogether different situation or relation is not as to him actionable", *St. L. & S. F. R. Co. v. Conarty*, 238 U. S., 243, 249, and they are to be construed in the light of the law as it was settled by the decisions of the Federal courts prior to their enactment. *Central Vt. R. Co. v. White*, 238 U. S., 507. Recovery can be had under

them only when the employer has breached some duty he owed the employe, and injury to the employe has resulted. The employer is not an insurer of the employe's safety. *Reese, Admx. v. Railroad Co.,* 239 U. S., 463; *Seaboard Air Line v. Horton,* 233 U. S., 492; *St. L. & I. M. Ry. v. McWhirter,* 229 U. S., 265.

We invoke this general rule:

> "If a servant voluntarily, and without any necessity growing out of his work, abandons the employment for which he is engaged and steps entirely outside the line of his duty, he thereby suspends the relation of master and servant as between his master and himself, and voluntarily puts himself in the attitude of a stranger,—in which case the question of the liability of the master to him for a negligent injury will be tested by the principles which would govern as between the master and a stranger."
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> *4 Thompson, Negligence* (2nd Ed.), §3749.

Stated a little differently, the relation of master and servant is contractual, and the law reads into the contract an obligation of care for the servant's safety upon the part of the master. But the obligation is coincident with the contract, and does not extend beyond it. Consequently the obligation exists only while the servant is engaged in the work he

was employed to do, and at the place in which he was hired to work. When he goes beyond either he is beyond the contract and the obligation of care has ceased.

> "The master contracts to exercise ordinary care for the purpose of keeping his premises, his machinery, his tools, and his appliances in a reasonable condition of safety for the protection of his servant employed to perform a stated service, and who is entitled to that protection while engaged in his work and so long as he continues therein and confines himself to what he is employed to do. * * * * * Where the servant leaves his own work to do something else for which he was not engaged, the duty of the master towards him reaches its vanishing point, as it has been said, at the moment of the transition, and his corresponding liability for a resulting injury disappears. There being no longer a contractual or legal relation imposing any duty on the master for a breach of which he would be liable, it follows that there is nothing upon which to rest any claim for damages, because no cause of action arises from a failure to perform a mere act of humanity, or for the violation simply of a moral obligation not involving any legal duty."
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> *Burnett v. Mills Co.*, 67 S. E., 30.

Thus stated, it is seen to be but a particular application of the rule stated in *St. L. & S. F. R. Co. v. Conarty* (*ubi sup.*), *viz.*, where a duty is imposed for

the protection of a person in a particular relation, one in a different relation cannot claim its obligation.

While the rule has been applied in hundreds of cases, we desire to call attention to a few, only, of those applying it where the injured employe was at the point where he was injured in violation of rules or orders, or had so far turned aside from his duties to further his own pleasure that he could by no stretch of propriety be said to be furthering his employer's interests when injured.

It was applied in a case where a workman in a mill left the place where he had been set to work and went to another part of the mill, where he was engaged in idle conversation when he was injured, *Williamson v. Berlin Mills Co.*, 190 Fed., 1; where a hostler whose duty it was to be in an engine cab when moving the engine in a railroad yard, exchanged places with another workman and was injured while turning switches, *Baltimore & O. R. Co. v. Doty*, 133 Fed., 866; where a workman in a mill was injured while attempting to do an act which he had been forbidden to do, *Burnett v. Mills Co.*, 67 S. E., 30; where a workman on a train which was standing on the siding waiting for another train to pass left his

place on the train and unnecessarily took up a position on the siding where he was injured, *Chesapeake & O. R. Co. v. Barnes*, 117 S. W., 261; where a workman who needed a tool in connection with his work unnecessarily went to get it himself instead of requesting the foreman to get it for him, as he should have done, *Harris v. Del Farenede, etc.*, 70 Atl., 155; where a workman about a mill, seeing a runaway car on a siding leading into the mill, without orders or necessity therefor left the place of his employment and went out to endeavor to stop the car, *McGill v. Maine, etc. Co.*, 46 Atl., 684; where an employe set to do certain work in a mill plant, voluntarily left the place where and the work to which he had been assigned, and was injured while endeavoring to do other work in another part of the mill, *Linquist v. Plaster Co.*, 117 N. W., 46; where a railroad employe who had gotten on an engine where he had no right to be, in going to his place of work, was killed by its derailment, *Martin v. Kansas City, etc. Co.*, 27 So., 646; where a miner left the place in the mine where it was his duty to work and went to another part of the mine for his own convenience, *Pioneer, etc. Co. v. Talley*, 43 So., 800; where an employe voluntarily

undertook to operate a machine which she was not employed to operate and with respect to which she had no duty to discharge, *Duvall v. Armour Packing Co.*, 95 S. W., 978; where a flagman sent to flag a train lay down upon the track and went to sleep, *Louisville & N. R. Co. v. Holland*, 51 So., 365; where an engineer going to take charge of his engine unnecessarily went into a dangerous place where he was not authorized nor required in the discharge of his duties to go, *Buckley v. N. Y. Central Co.*, 126 N. Y. S., 480.

The foregoing cases are decisions turning upon the general law, without construction of statutory language. The Employers' Liability and Workmen's Compensation Acts which have superseded so much of the case law relating to the master's liability for injuries sustained by his servant, have not at all changed the rules which determine when the relation of master and servant exists, so that the provisions of those Acts may be invoked. All, Liability and Compensation Acts alike, fix the liability or award the compensation when the employe is injured "in the course of his employment", or when "employed" in certain work, and the meaning of those terms has

been determined by reference to the rules of law existing when the Acts were adopted.

In *Bryant v. Fissell*, 86 Atl., 458, 460, the Supreme Court of New Jersey, construing the Liability Act of that State, said:

> "We conclude, therefore, that an accident arises 'in the course of the employment' if it occurs while the employe is doing what a man so employed may reasonably do within a time during which he is employed, and at a place where he may reasonably be during that time."

The same Court later decided a case, *Reimers v. Proctor Pub. Co.*, 89 Atl., 931, in no way to be distinguished from the case at bar in so far as the question under discussion is concerned. A man employed to distribute newspapers took for the purposes of his work an automobile he had been ordered not to use, and was injured while using it. His injury was held not to have arisen "out of and in the course of the employment" within the meaning of the Compensation Act of New Jersey.

Construing the Nebraska Liability Act, the Supreme Court of that state held in *Anderson v. Mo. Pac. R. Co.*, 145 N. W., 842, that when an intoxicated section foreman had been sent home by his superior

officer, but later returned and assumed charge of his men and was injured, he "was clearly beyond the scope of his employment", a "mere volunteer and trespasser", and not within the protection of the Act.

In *Hobbs v. Gt. Nor. R. Co.*, 80 Wash., 678, it was held there could be no recovery under the Federal Liability Act where a hostler's helper in railroad yards was killed while standing on the pilot of an engine; it not appearing for what purpose he was there, and it being against the rules for him to ride in such a place. Stating the master's duty of protection to his servant, it was added:

> "But that duty is not incident to places where a servant is not required to be, nor expected to be, in the performance of his work. Nor does it cover the servant when he is not within the scope of his employment or doing some act which is not incidental to his employment. This rule is sustained by all the authorities, and the Federal act in no wise attempts to change it."

In the later case of *Vanordstrand v. Nor. Pac. R. Co.*, 86 Wash., 665, a call boy employed in a railroad yard was sent to call a train crew. He got on a train to ride to the place where he was required to go, a thing he had been forbidden to do, and was injured. It was held there could be no recovery under the

Federal Act, the Court saying:

> "These boys were not upon this train in the discharge of any duty required by the railway company. It was neither an incident to their employment nor was it a place where it should be reasonably anticipated they might be, but on the contrary, the place was one where they had no business to be, and where they were expressly prohibited from being."

Applicable decisions in the United States of the particular question are not numerous; Liability and Compensation Acts being in this country comparatively recent legislation. There are many decisions affecting it under the model of all Compensation Acts, the British Workmen's Compensation Act, however. We shall refer to only so many of those which are accessible to us as bear upon the precise point we make, *viz.*, that a workman who goes outside the duties prescribed for him, particularly when he does so in violation of the rules and orders of his employer, and in consequence is injured, is not within the course of his employment and consequently is not entitled to recover under the Act.

In the following cases the injured workman was held not to be in the course of his employment when he was injured: When a colliery employe was trying

to mount a moving train in order to ride to his home contrary to a rule forbidding anyone to get upon the train except those in charge of it, *Pope v. Hills Plymouth Co.*, 102 L. T. N. S., 632; when a workman engaged in overtime work on a vessel went ashore to purchase bread against his foreman's orders and was injured while returning to the vessel, *Martin v. Fullerton* (1908) Sc. Ct. Sessions, 1030; when a workman in a power house who had been forbidden to go about the switchboard undertook to dust it, *Jenkinson v. Harrison*, 4 B. W. C. C., 144; when a girl employed to sort coal undertook to start an engine which she had been forbidden to do but had done at sundry other times, *Losh v. Evans*, 19 Times L. Rep., 142; same holding with respect to a baker starting an engine in violation of orders, *Marriot v. Brett*, 5 B. W. C. C., 145; when the driver of a canal boat who was forbidden to steer it undertook to do so upon the desertion of another boatman, although no emergency had arisen which rendered it necessary that the driver should undertake the work, *Whelan v. Moore*, 2 B. W. C. C., 114; when railroad employes whose duty did not require them to get upon a train and an engine did so for their

own purposes, *Smith v. Lancashire etc. Co.* (1899), 1 Q. B., 141; *Williams v. Wygan etc. Co.*, 3 B. W. C. C., 65; when employes left their place of work and went elsewhere for their own purposes, during which time they were injured, *Reed v. Great Western etc. Co.* (1909) A. C., 31; *Morrison v. Trustees* (1909) Sc. Ct. Sessions, 59; when a brakeman whose duty it was to walk behind a lorry and be ready to apply the brakes, in disobedience of the rules got on the lorry to chat with the driver, *Revie v. Cumming* (1911) Sc. Ct. Sessions, 1032; when a boy sent on a message, though expected to take a tramway, was injured while trying to board a tramway car in motion, this being forbidden, *Symon v. Wemyss Coal Co.* (1912), Sc. Ct. Sessions, 1239; when a workman whose employment required him to be on a platform went behind a machine where he had no business to be and was injured while putting a nail in it for his own purposes, *Scaizo v. Columbia Macaroni*, 17 B. C., 201.

There is an even stronger view of the case against Campbell which we think must be taken. The wreck occurred in Idaho, and two sections of the criminal code of that State are as follows:

"Every engineer, conductor, brakeman, switch-tender, or other officer, agent, or servant of any railroad company, who is guilty of any wilful violation or omission of his duty as such officer, agent, or servant, whereby human life or safety is endangered, the punishment of which is not otherwise prescribed, is guilty of a misdemeanor."

"Every conductor, engineer, brakeman, switchman, or other person having charge, wholly or in part, of any railroad, car, locomotive, or train, who wilfully or negligently suffers or causes the same to collide with another car, locomotive or train, or with any other object or thing whereby the death of a human being is produced, is punishable by imprisonment in the State Prison for not less than one nor more than ten years."

2 Idaho Revised Codes, §§6926, 6909.

Campbell stands convicted by his own testimony and the jury's finding of a wanton, wilful violation of duty which caused the death of eighteen persons. Had he died, or, living, permitted the inference, no doubt it would be inferred that he mistakenly read his order, or forgot it during the short time it took to run past the wye and a mile on the main line. But his testimony left no room for inference. He squarely planted himself upon the claim that he went out on the main line because his order required him to; that he carefully read it and thoroughly understood it, and understandingly acted in obedience to it. The jury's

finding, based upon overwhelming evidence, permits nothing but that Campbell's testimony be discarded as a fabrication, and nothing remains to excuse him from the charge of wilful violation of his duty and consequent criminality under the Idaho statute. So accepted, Campbell was clearly not within his employment when injured.

In *Seaboard Air Line v. Chapman*, 62 S. E., 488, a locomotive engineer sued in Georgia to recover damages under a North Carolina statute for injuries received in the latter state through the negligent starting of a locomotive while he was mounting it to take charge of it. Contributory negligence was the sole affirmative defense first pleaded, but the defendant later sought, and was denied, permission to amend its answer to plead plaintiff's intoxication when he was injured, and a North Carolina statute making it an offense for an intoxicated person to take charge of a locomotive. It was held error to deny the right to plead the statute; that "Its relevancy to the case inheres in the question as to the defendant's negligence, rather than in the question as to the plaintiff's contributory negligence"; that the plaintiff could not claim the benefit of the Lia-

bility Act unless he was acting within his employment when injured, and that he could not be within his employment if he was acting unlawfully. To quote:

> "Now, if the plaintiff was intoxicated at the time of his injury, and was trying to get upon the locomotive to take charge of it as engineer, he was not there in an effort to perform a duty, but to violate the law; for to take charge of an engine while intoxicated is a crime in North Carolina.
>
> * * * * If he was intoxicated, and came upon the company's premises for the purpose of violating the law, he was no longer an employe in the line of his duty, but was a mere trespasser, or quasi trespasser, and entitled to no higher degree of care than any other person who might have attempted to climb upon the engine to violate any other criminal statute would have been."

In *Lloyd v. North Car. R. Co.,* 66 S. E., 604, the Supreme Court of North Carolina held that a railroad employe who was injured while working in violation of a statute could not recover damages, saying:

> "It is very generally held, universally so far as we are aware, that an action never lies when a plaintiff must base his claim, in whole or in part, on a violation by himself of the criminal or penal laws of the state."

Under the plain implication in *North Car R. Co. v. Zachary, supra,* it must surely be held that Campbell's criminal act was both out of the ordinary and inconsistent with his duty to his employer, and therefore that in its commission he was beyond the scope of his employment.

It may be urged that our position is but an indirect way of claiming that Campbell cannot recover because he was guilty of contributory negligence. If in its ultimate analysis the principle we rely upon is found to be no more than that, it is perhaps unsound, the effect of contributory negligence being later discussed. But it is not to be confounded with the doctrine of contributory negligence.

In construing the British Workmen's Compensation Act, the English courts have frequently had occasion to remark and carefully define the distinction between improper acts done in the course of an employment, which do not debar recovery, and conduct so unrelated to the employment as to be without its pale, which does bar recovery. The House of Lords held in *Plumb v. Cobden Flour Mills Co.* (1914) A.

C., 62; 1914 B. Am. & Eng. Ann. Cas., 495, that a workman employed to pile sacks by hand went beyond the scope of his employment when he rigged up a device in connection with the shafting for doing the work, and in consequence was injured. Answering the argument that this was but a negligent act in the course of the employment, Lord Dunedin said:

> "The fallacy of this consists in not adverting to the fact that there are prohibitions which limit the sphere of employment, and prohibitions which only deal with conduct within the sphere of employment. A transgression of a prohibition of the latter class leaves the sphere of employment where it was, and consequently will not prevent recovery of compensation. A transgression of the former class carries with it the result that the man has gone outside this sphere."

The following quotation from the opinion of Lord Loreburn in *Barnes v. Nunnery Colliery Co.* (1912) A. C., 44, was given as also properly marking the distinction in question:

> "Nor can you deny him compensation on the ground only that he was injured through breaking rules. But if the thing he does imprudently or disobediently is different in kind from anything he was required or expected to do and also is put outside the range of his service by a genuine prohibition, then I should say that the acci-

dental injury did not arise out of his employment."

In *Parker v. Hambrook,* 107 Law Times Rep., 249; 1913 C. Am. & Eng. Ann. Cas., 1, the case was of a workman who was employed to dig up flints at any place he chose to work on his employer's premises except a certain trench, into which he was forbidden to go because it was considered dangerous. It was held he could not recover for injuries sustained by reason of going into the trench to dig. This illustration was adopted from another case:

> "If I tell a workman to mend a window from the inside and he thinks it is more convenient to mend it from the outside, the fact that he did it from the outside and not from the inside would not disentitle him or his dependents to compensation if he met with an accident which resulted in his death or serious and permanent disablement within the meaning of sec. 1, sub-sec. 2 (c), of the Act of 1906. But if I told him to mend one particular window and he goes and mends another window where I have told him not to go, that would disentitle him to compensation."

Referring to the reasoning of the lower court it was said:

> "Therefore, when the learned county court judge says that the workman was engaged to dig up as

> many flints as he could, it appears to me to be an incorrect statement of the employment. He was engaged to dig up as many flints as he could without going into the trench. Therefore it cannot be said that it was the effective furtherance of any task set him by his employer, or any task which he was specially engaged to carry out."

The principle of those cases is apparent, sometimes remarked and sometimes not, in all the English cases heretofore cited. And so in the few American cases there are. *Barnes v. Nunnery Colliery Co.*, which was cited and followed in *Plumb v. Cobden Flour Mills Co., supra,* was cited and followed by the Supreme Court of New Jersey in *Reimers v. Proctor Pub. Co., supra.* While the Nebraska and Washington cases herein cited refer to no authority, their principle is that of the English cases, particularly the *Vanordstrand Case* of the Washington Supreme Court.

Now the thing that Campbell was doing when injured was—in the language of Lord Loreburn—"different in kind from anything he was required or expected to do." His train was at a terminus of the road, and had no right to leave the terminus and start on the return trip until ordered to do so. A

train coming from the other terminus, and having an absolute right of way, was momentarily expected. For Campbell to take his train out on the single track in its face was not merely foreign to his employment, but abhorrent to it; how abhorrent is evidenced by the catastrophe which resulted. Applying Lord Dunedin's language, the act was not a mere violation of "prohibitions which only deal with conduct within the sphere of employment", but a violation of "prohibitions which limit the sphere of employment". A railroad company must operate its road by rule and system; must be able to absolutely control the places and times where its employes are to do their work, else the safety of both passengers and employes is upon the whim of any disobedient and reckless employe. Suppose this case: A work train is sent to a designated siding to do certain work, with instructions to remain there until it is ordered elsewhere. On the way to the siding its operators stop to do some work they were not directed to do, or, their work on the siding finished, without orders go out on the main line to do some work which occurs to them. In either case the persons responsible for the unauthorized movement of the work train could not,

surely, claim to be within their employment and therefore entitled to recover for injuries sustained in a collision resulting from their act. Take another case: of the engineer and conductor of a special train who are directed to go to a certain siding and wait on it until a regular train has passed. The regular train is delayed, and the operators of the special train, becoming impatient, decide they will go on to some other point to meet it. If such an act could be said to be within their employment, it is manifest that no order which a railroad company can give as to the place or time in which work shall be done can limit the sphere of employment. A railroad employe, set to work with his train in the morning, can move it when and where he pleases, in defiance of rule and order, and yet insist that he has kept within his employment.

There is no analogy between the supposititious cases (or the actual case of Campbell) and the case of a switchman who, during the progress of his work, goes between the cars in violation of the rules when a defective coupling fails to work. The switchman was doing what he was set to do: couple the cars; and if he did the work in an imprudent fashion it

was merely a case of mending the particular window he was set to mend from the outside instead of the inside. The analogy would be sufficient, though not complete because not introducing the element of peril to passengers and fellow employes, if the switchman, being directed to make up a particular train in a particular yard where the work was not attended with danger, instead took his engine and went to a different yard and set about dangerous work, which he had been told not to do. That would be a case of not touching the window he had been employed to mend, and attempting to mend one he had been directed to let alone.

We have heretofore remarked upon the fact that Campbell made no claim to have mistaken his orders, or indicated the possibility of negligence on his part and an excuse for it, but instead based his right to be out on the road on a story the jury found to be false. Had he claimed error, however, he could not have escaped the effect of the principle under consideration. If the Company gave Campbell clear and unmistakable orders, upon which it had the right to regulate its operations assuming that he would understand and obey them, he could not excuse his dis-

obedience by claiming to have misread or forgotten them. The principle involved is one of contract. The master employs the servant to do certain work and the servant agrees to do that work. So long as the servant is engaged upon that work he is within his employment; when he turns away from it to other matters he is without it. If the master clearly states the contract of hiring and what is to be done, so that a person situated as the servant should in the exercise of ordinary care have understood, the terms and the work cannot be changed into something the master did not assent to merely because the servant negligently misunderstood. These familiar contractual principles do not appear to have been in any way changed by Liability and Compensation Acts.

(b) *Campbell's train was not such as the Safety Appliance Act requires to be equipped with air brakes. The special finding concerning the brakes, if sufficient to show them defective if the Safety Appliance Act were applicable, is insufficient for the purpose, the Act being inapplicable.*

The generic term "railroad" when used in railroad regulation acts without limiting or explanatory words or context is, unquestionably, broad enough to in-

clude electrically operated railways. It was so indicated in *Kansas City etc. Co. v. McAdow*, 240 U. S., 51. Furthermore, we conceded in *Spokane & I. E. R. Co. v. United States*, No. 136, October Term, 1915, submitted but not decided when this brief was written, that the provisions of the Act requiring automatic couplers and grab-irons were applicable to all cars used upon the Company's road save such as were "used upon street railways". The provision requiring air brakes, however, seems intended to be only applicable to steam locomotives. If it was the Congressional intention to so limit it, the intention will be given effect, notwithstanding other words of the Act are broad enough to include all kinds of motive power on railroads. *Omaha St. Ry. v. Int. Com. Comm.*, 230 U. S., 324.

The title of the Act is:

> "An act to promote the safety of employees and travelers upon railroads by compelling common carriers engaged in interstate commerce to equip their cars with automatic couplers and continuous brakes and their locomotives with driving-wheel brakes, and for other purposes."
>
> 27 *Statutes L.*, 531; 6 *Fed. Stat. Ann.*, 752.

The first section of the Act reads as follows:

> "That from and after the first day of January, eighteen hundred and ninety-eight, it shall be unlawful for any common carrier engaged in interstate commerce by railroad to use on its line any locomotive engine in moving interstate traffic not equipped with a power driving-wheel brake and appliances for operating the train-brake system, or to run any train in such traffic after said date that has not a sufficient number of cars in it so equipped with power or train brakes that the engineer on the locomotive drawing such train can control its speed without requiring brakemen to use the common hand brake for that purpose."

Section six, prescribing penalties, also uses the words "locomotive engines" and "locomotives". The same language is used in the amendment of 1903. 32 Stat. L., 943; 10 Fed. Stat. Ann., 375. In section one of the amendment the word "locomotives" appears twice, and the air brake provisions found in section two require the brakes to be operated by the "engineer of the locomotive" drawing the train. Furthermore, when the Interstate Commerce Commission, acting under the authorization of section two of the amendment, made an order respecting the operation of power brakes it used the term "engineer of the locomotive".

It needs no more than suggestion that the words

"locomotive" and "locomotive engine" mean to the average man a steam locomotive. Forty years ago it was judicially noticed that the word "engineer", when used in connection with railroads, "is invariably employed to designate the party in charge of the locomotive." *Whitehouse v. Grand T. Ry. Co.*, 29 Fed. Cas., 1033, 1035. In railroad circles the same meaning attaches, for in the Company's rules the distinction is preserved between "enginemen" and "motormen" (22-24), and also on its orders (34). Now ordinarily "common or popular words" when used in a statute "are to be understood in a popular sense", *Sutherland, Statutory Construction*, §247, and it is "an elementary principle in the construction of statutes that the common usage of words at the time of the enactment is a true criterion by which to determine their meaning". *Hartford v. Nor. Pac. R. Co.* (Wis.), 64 N. W., 1033, 1034. Following this principle the courts have almost universally held that the use in statutes relating to railroad operation of the words "locomotive", locomotive engine", or "locomotive engineer", indicated the legislative intention to restrict the operation of the statute to the usual steam railroad. *Birmingham etc. Co. v. Ozburn*

(Ala.), 56 So., 599; *Galveston etc. Co. v. Railway Co.* (Tex.), 123 S. W., 1140; *Kammann v. St. L. & N. E. Ry. Co.*, 173 Ill. App., 277; *Conover v. Railway Co.* (N. J.), 78 Atl., 187; *Indianapolis etc. Co. v. Andis* (Ind.), 72 N. E., 145; *Fallon v. Railway Co.* (Mass.), 50 N. E., 536; *Mudd v. Railway Co.* (Mo.), 124 S. W., 59; *Norfolk etc. R. Co. v. Ellington* (Va.), 61 S. E., 779; *Cleveland etc. Co. v. Somers*, 24 Ohio Cir. Ct. Rep., 67.

The reason beneath the above decisions strongly appeals for a construction of the Safety Appliance Act in accord with them. Manifestly the original Safety Appliance Act was not intended to apply to any other class of railroads than steam commercial roads, for in 1893 there was no other class worthy of mention within the sphere of Federal control. By 1903, however, the rapidly increasing use of electricity as a motive force had called into being a great many electric railway lines, which did a business akin to that done by steam roads, and a number of which were engaged in interstate business. Judicially noticed in *Omaha St. Ry. v. Int. Com. Comm.*, 191 Fed., 40, 46. Congress could not have been ignorant of their existence and importance; indeed, the exception

from the operation of the Act of cars "which are used upon street railways" then first introduced into the Act shows they must have been in mind, and if it was deemed desirable or feasible to require electric motors to be equipped with air brakes, the use of the words "locomotive" and "engineer" would not have been persevered in. Neither, certainly, would the Interstate Commerce Commission, with all the technical knowledge which it possesses, have used the words "engineer of the locomotive" in making its order respecting air brake equipment unless it supposed that steam equipment was all that was to be dealt with.

It appears from the complaint that the Company's road is an electric railroad, and that the train Campbell was operating when injured was an electric train; also that he was a motorman, not an engineer (1). The special findings establish that the general verdict was based solely upon the charge of negligence in the air brake equipment of the train. If the Safety Appliance Act is not applicable, no duty rested upon the Company to equip the train with air brakes, for the master is only bound to exercise reasonable care in

furnishing appliances, and that does not require that he furnish the newest and best. *So. Pac. Co. v. Seley*, 152 U. S., 145; *Patton v. Railway Co.*, 179 U. S., 658. Moreover, the finding of the jury respecting the air brakes simply is that they were "insufficient to enable Campbell to control the speed of the train", "immediately before the collision" (12). There was no evidence of any defect in the air brakes, it being undisputed that they were of the standard Westinghouse pattern, and had worked perfectly until a second before the collision, when for some unexplained reason they released—of which more under the next head. In the absence of a controlling statute the rule *res ipsa loquitur* is not applicable to such a case as this. *Patton v. Railway Co., supra.* Therefore when the finding is read in the light of the evidence, as under the State practice it should be, it appears that the jury did not find the air brakes defective; only that for some reason they did not control the train at the moment of the collision.

(c) *Conceding that the air brake provisions of the Safety Appliance Act apply to electric trains, the duty it imposes was not owed Campbell under the*

extraordinary circumstances established by the jury's findings.

The duty which the Act imposes is absolute, but it is not owed to every person or under all conditions. Like all protective statutes, it is designed for the protection of a class, and, logically, of a meritorious class peculiarly exposed to the danger sought to be guarded against, else the law-making body would not have been concerned for their protection. Thence flows the doctrine applied in *St. L. & S. F. R. Co. v. Conarty*, 238 U. S., 243: that where a duty is imposed for the protection of persons in a particular situation, a breach of it which happens to cause injury to a person in an altogether different situation is not as to him actionable. The purpose of the air brake requirements was to place control of the train in the hands of the engineer in order that train operation might be facilitated and the safety of passengers and employes conserved; not that the engineer should be able to escape injury from peril to which he had wrongfully exposed himself. No doubt Congress contemplated that wrongful acts might create emergencies in which injury could only be averted by use of air brakes, and no doubt a passenger, or an

employe not responsible for the peril, might properly assign negligence upon the insufficiency of the brakes in such an emergency. But Campbell cannot bring himself within the class intended to be protected by pointing out that the situation created by his disobedience of orders was one which Congress contemplated as possible, and the consequences of which it desired to guard against. He must show that Congress had in mind his situation and intended to protect him in it, else he cannot say that a duty was imposed for his protection.

In the *Conarty Case* the injured man was engaged in the proper discharge of his duties, and had the provisions of the Act been complied with, he would have escaped injury. Yet his situation was held to have been one in which Congress did not intend to protect by the Act. May it be said that Campbell's situation was one in which Congress intended to protect him?

SECOND HEAD.

(d) *If it is held that the Safety Appliance Act is applicable and intended for the protection of a person in Campbell's situation, yet there is no evidence, as matter of law, that it was breached.*

As has been indicated, the complaint charged negligence in only two particulars: the giving of improper orders, and the furnishing a train insufficiently equipped with air brakes (2). Campbell's testimony made a case for the jury on the first charge of negligence, but if we are right in our conclusions, the evidence made no case of insufficient brakes for the jury's consideration. Therefore at the close of all the evidence we requested three instructions to the jury, the effect of all, couched in variant language, being that if the jury found that Campbell had no orders against Number 20, but left Coeur d'Alene in violation of his orders, its verdict should be for the defendant, since no other cause of action than the giving of improper orders was made by the evidence (52). Those instructions were refused, and both charges of negligence were submitted to the jury; the Company excepting to the refusal to instruct as requested and to the instructions submitting the question of insufficient brakes to the jury (54, 56-58). The jury found against Campbell on the charge of improper orders, but returned a verdict in his favor on the charge of insufficient brakes (58). Want of evidence to sustain the charge of insufficient brakes,

the refusal to give instructions withdrawing from the jury the charge of insufficient brakes, and the submitting that charge to the jury, were all urged as cause for a new trial (59, 60).

The Company's evidence tended strongly to prove that the failure to stop the train was not due to defective brakes, but to Campbell's failure to observe Number 20 until he was almost upon it, and that the brakes operated perfectly in the emergency and held until the trains collided. But we do not, of course, contend against the jury's verdict, and ask the Court to determine that the Company's evidence outweighs Campbell's. We merely ask the Court to determine, as matter of law, the effect of Campbell's evidence and of so much of the Company's as is not in dispute.

The absolute nature of the duty imposed by the Safety Appliance Act, as stated in *St. Louis etc. Ry. v. Taylor,* 210 U. S., 281, and *Chicago etc. Ry. v. United States,* 220 U. S., 559, is not, of course, called in question. The question which is presented may be stated in two ways; both, however, seeming to require the same answer. The first: Is a railroad company an insurer that the appliances required by

the Act shall work perfectly under all conditions, however unusual and unexpected, and bear any stress put upon them, however extraordinary? The second: Does the mere failure of a standard air brake to respond to the strain of an extraordinary application, made in an emergency, prove it to have been defective; the evidence showing that within a very few minutes of such application it was in perfect condition and responded perfectly to the requirements of ordinary train service?

The evidence shows that Campbell's train—Motor 5 and two trailers—was "equipped with the Westinghouse Standard Automatic air brake, such as is in general service all over the country on passenger equipment" (44). Shortly before the accident the air equipment was thoroughly gone over to see that it was in good condition, and the day of the accident, after the train came in from Spokane on its run, the air brake inspector at Coeur d'Alene tested the brakes under ordinary service applications, looked to see if the brakes released properly, etc., and "found them in perfect working order" (43). The Company's rules required both motormen and conductors to personally inspect the air brakes on their trains, pay

careful attention to the manner in which they worked, and immediately report any defective condition or improper operation (22-23). The master mechanic at Coeur d'Alene testified that he had never received any complaint from Campbell or anyone else concerning the air brake equipment on the train (41). The testimony of all the other trainmen and of a number of the passengers on Campbell's train showed that they felt the brakes applied just before the collision; the trainmen knowing that it was an emergency application and that an accident of some sort was imminent (25-26, 34-35, 42); the passengers only knowing that they felt "a jerking, jarring, and grinding of the train as though the brakes had been applied very hard, or something of that sort; that it was so severe as to cause a lurching or jerking of the train", followed almost immediately by the collision (43). And a man standing by the track several hundred feet from the point of the collision testified that Campbell's train did not begin to slacken speed until it passed him, but when it began to slow down it continued to do so until the collision (41-42).

Campbell testified that he was starting on his third trip for the day when the collision occurred; that he

had run the same train without change all day, and had tested the air, as was his duty, before leaving Spokane in the morning (20). He did not test the air before starting from Coeur d'Alene, a terminal point, on the trip the collision occurred, although the rules so required (23), because there were men at Coeur d'Alene to inspect the train, and also because the air had been working all right. To quote: "My air had been working all right all day. When I wyed in it was working all right. When I started out and released it to go, it was working all right, and the first time I found anything the matter with it was when I used it in that particular position" (22). The train had run about one and one-half miles when he saw Number 20. He immediately "dynamited" his train, which, he explained, meant giving it "all the air I had" (18, 24). "People upon the train when it is dynamited would feel a sudden jerk, a very considerable jar, such as is produced by nothing else in the operation of trains" (24). Under the dynamite application the brakes took hold and held for a very brief space; while the train was running forty feet, perhaps, then released. Two railroad men, passengers on the train, who were in the cab

with Campbell, corroborated his story of dynamiting the train, the brakes holding briefly, then releasing (26, 28).

The evidence so far referred to presents the second question stated (*ubi sup.*): whether mere failure of a standard air brake, always theretofore working perfectly, to respond to an emergency application is evidence that it was defective. Campbell's testimony, next to be noted, presents the first question: whether a railroad company is an insurer of its appliances under any strain, however extraordinary, which may be put upon them.

Campbell, concluding that: " I don't know what did happen, and I don't think anybody else does, either" (25), offered several hypotheses in explanation of the failure of the brakes. One was that a piece of dirt might have gotten into the triple valves; portions of the air system, some of which are underneath the cars and some in the cars. If that was the cause, the dirt might have gotten in between Coeur d'Alene and the point where he saw Number 20, or it might have been in longer. Its presence would not be discovered until an emergency application was

made; until the train was dynamited, in other words, and

> "It was the first time that the valve had been used in that position for some length of time. It is not very often that a motorman has occasion to use his emergency brakes to slow her, to put that kind of a strain. He is not supposed to test his air in all positions in the yards. It is very impractical for a man in any service, any emergency appliances" (25).

Another cause might have been "dirty valves in connection with the cylinders"; "rust or water will sometimes do it" (24, 25).

And lastly he testified that it might have been occasioned by an improper application of the brakes. To quote:

> "I don't know whether the brakes broke in two when I applied them or not; they could do it. If there was an air connection brake in the train line, they might break from putting them on too hard. Possibly it would break the brake-beam, or something like that. It would not release the air unless you broke the cylinder; that would release it. If you did not apply your emergency properly, that might have happened" (25).

This testimony, we submit, brings the case squarely within *Patton v. Texas & P. R. Co.*, 179 U. S., 658.

Unless it is said the Company was an insurer against the breaking of any part of the train's brake system, whether there was a breach of its duty is purest surmise. Let it be assumed that dirty cylinder valves should have been guarded against. That is but one of several causes Campbell suggests for the failure of the brakes. Certainly the Company was not liable because a piece of dirt got into a triple valve underneath a car in the mile and one-half run from Coeur d'Alene to the point of collision (it not being suggested that such an accident could be guarded against) unless it was an insurer. Certainly if it is said the failure was due to a piece of dirt which had been longer in a triple valve, and which would not interfere with any ordinary use of the brakes, but did prevent an emergency application, it must be held as an insurer, if at all, when the need for the emergency application was solely occasioned by Campbell's wrong. And when Campbell admits that the failure might have been due to the breaking of any of a half dozen parts of the system, occasioned by his applying the brakes improperly, certainly there is no liability but that of an insurer under which the Company can be held. The insurer idea is exploded by *St. Louis*

etc. Ry. v. McWhirter, 229 U. S., 265, *Seaboard Air Line v. Horton*, 233 U. S., 492, and *Reese, Admx. v. Phil. & R. R. Co.*, 239 *U. S.*, 463. The Federal Acts made radical changes in the duty owed by a master to his servant, but the Acts, in respect of all incidental matters not specifically dealt with, are to be construed in the light of Federal decisions made prior to their enactment. *Central Vt. Ry. v. White*, 238 U. S., 507. Such, too, is the effect of the *McWhirter, Horton*, and *Reese Cases*. The *Patton Case* merely states a rule of evidence: that in an action by a servant to recover damages for a breach of the master's duty to him, it is not sufficient that it appears that the master may have breached his duty, and in consequence the servant was injured; the evidence must point to the fact that he did breach it, and that the injury complained of resulted from the breach. It has been uniformly followed by the Federal courts as a rule of evidence under both Federal and State Liability Acts. *Chicago et. Ry. Co. v. O'Brien*, 132 Fed., 593; *Shondrew v. Railway Co.*, 142 Fed., 320; *Midland etc. Ry. v. Fulgham*, 181 Fed., 91; *Lyddy v. Railway Co.*, 197 Fed., 524; *Smith v. Railway Co.*, 200 Fed., 553; *Norfolk & W. Ry. v. Hauser*, 211

Fed., 567; *Crucible Steel Co. v. Moir,* 219 Fed., 151. The State courts, too, hold that the Liability Acts, Federal or State, have not dispensed with the necessity for connecting by evidence, not surmise, the breach of the master's duty with the servant's injury. *Bowers v. Railway Co.* (Ga.), 73 S. E., 677; *South Cov. Ry. v. Finan's Admx.* (Ky.), 155 S. W., 742; *Scroggins v. Cement Co.* (Ala.), 60 So., 175; *Wrightsville etc. Ry. v. Tompkins* (Ga.), 70 S. E., 955; *Johnson v. Railway Co.* (Ala.), 58 So., 447; *Walton v. Railway Co.,* 52 So., 328.

Under Campbell's admission that he does not know what did happen, but that it might as well have been something caused by an improper application of the brakes by him as by anything which the Company could have controlled, and in the absence of any evidence tending to show one cause rather than another for the failure of the brakes, the *Patton Case* controls unless the Federal Acts have made insurers of railroad companies.

The situation is not materially altered, we think, if Campbell's various hypotheses are disregarded, and the case is considered on these naked facts: That a standard air brake system, apparently in perfect

condition, and working perfectly under all the requirements of ordinary train service up to a few minutes before the accident, for some unexplained reason failed to work perfectly under an emergency application. Great innovations must be made in the law as it is written in previous decisions if those facts are held to be evidence that the braking system was defective.

In the two leading cases upon the subject of the duty imposed by the Safety Appliance Act, it was held the duty was absolute. *St. Louis etc. Ry. v. Taylor,* 210 U. S., 281; *Chicago etc. Ry. v. United States,* 220 U. S., 559. But the term was used, as we read those decisions, to mark the distinction between the duty of reasonable care, for which the railroad companies contended, and the duty which the Court held the Act imposed. In the *Taylor Case* it was conceded that the draw bar which caused the injury was defective, but it was contended that the railroad company had discharged its full duty by furnishing train crews with appliances for correcting such defects and requiring their correction when discovered. The case turned upon whether the statutory duty was discharged by the company using "reasonable care to

keep the draw bars at a reasonable height" (p. 294). *Chicago etc. Ry. v. United States* was not different. From the opinion of the Circuit Court of Appeals which was adopted by this Court, it appears that the railroad company conceded "there was evidence tending to prove the defective condition of each of the four cars as charged", and that the sole contention of the company was that

> "Inasmuch as it appears by the proof that defendant did not know its cars were out of repair and had no actual intention at the time to violate the law, but on the contrary had exercised reasonable care to keep them in repair by the usual inspections, it is not liable in this action."
>
> 220 U. S., 569.

In *Chicago etc. Ry. v. Brown*, 229 U. S., 317, 320, the Court said:

> "And the concession is made that in the *Taylor Case*, 210 U. S., 281, and in *C., B. & Q. R. R. Co. v. United States*, 220 U. S., 559, this court settled that the failure of a coupler to work at any time sustains a charge of negligence in this respect, no matter how slight the pull on the coupling lever."

The concession seems utterly unwarranted by the facts of and the points urged in those cases, or by any language of the Court. It was, in any event,

immaterial to the disposition of that case, for its facts, as adopted by this Court from their statement by the Circuit Court of Appeals (see p. 319), showed that the injured man made repeated unsuccessful efforts to work the coupler before stepping between the cars. Furthermore, although it was in the power of the railroad company in that case to show what the actual condition of the coupler was, it made no effort to do so, but, as stated by the Circuit Court of Appeals: "The existence of negligence, upon the part of the plaintiff in error, is practically admitted." 185 Fed., 80, 83-84.

In *Minn. & St. P. Ry. v. Popplar*, 237 U. S., 369, it appears that the injured man "tried repeatedly" to uncouple a car by the use of the lifter, but was unable to do so, and a witness for the railroad company, who examined the coupler immediately after the accident, testified that it worked with difficulty, and that he would have reported it as a "bad coupler" had his attention been directed to it. This was held to be enough to take the case to the jury "upon the question whether, in fact, the coupler was defective".

In all the cases, too, the conditions under which the appliances were attempted to be used were normal,

so that nothing but defectiveness could be suggested as probable cause for their failure to work.

We submit those cases are very, very far from warranting a submission to the jury of the question of defective brakes in the case at bar. If it was submissible, it must be under the rule *res ipsa loquitur*, for there was no evidence of defectiveness but their mere failure to work at the moment of collision. The evidence showed that a few minutes before the collision, the last time there was an opportunity to test their condition, they were in perfect order. There was no opportunity to ascertain their condition after the collision, for the motor was demolished in the wreck (44). In *Texas & P. R. Co. v. Barrett*, 166 U. S., 617, and *Patton v. Texas & P. R. Co.*, 179 U. S., 658, this Court held that in an action by a servant to recover damages from his master for injuries sustained, no presumption of negligence arose from the mere failure of appliances, but to sustain a recovery there must be evidence of defects in the appliances due to the master's neglect. Like those cases is *Looney v. Met. R. Co.*, 200 U. S., 480, in which it was said:

"To hold a master responsible, a servant must

> show that the appliances and instrumentalities furnished were defective. A defect cannot be inferred from the mere fact of an injury. There must be some substantive proof of the negligence. Knowledge of the defect or some omission of duty in regard to it must be shown.
>
> * * * * * *
>
> A presumption in the performance of duty attends the defendant as well as the person killed. It must be overcome by direct evidence."

It is unquestionable that under the Safety Appliance Act, proof of a defective condition is also proof of negligence. But the Act does not say what shall be proof of defects, and

> "A statute which simply imposes a new obligation upon an employer, or renders him liable for the negligence of an employee who would, apart from its provisions, have been regarded as a mere coservant of the injured person, leaves upon the plaintiff the burden of proving the existance of such culpability as will entitle him to maintain the action."
>
> *4 Labatt, Master and Servant* (2d Ed.), p. 4902.

It has been said that under the Federal Liability Act:

> "The questions of negligence and of proximate cause are still to be determined according to the

general existing rules on that subject."

Bowers v. So. Ry. Co. (Ga.), 73 S. E., 677, 679.

Also that

"Under the federal statute the plaintiff must show negligence under the rules ordinarily applicable to cases of that character."

South Cov. R. Co. v. Finan's Adm'x (Ky.), 155 S. W., 742, 744.

The principle was applied by the Circuit Court of Appeals for the Eighth Circuit in an action under the Safety Appliance Act, where the charge was that an employe was injured because of a defective coupler, and

"Upon this issue the testimony was that Pogue first took hold of the lift pin lever and jerked it, and then stepped in between the cars, and either placed his hand upon the coupler or was about to do so when he was knocked down; that couplers sometimes get rusty and it requires two or three jerks of the levers to open them; and that sometimes a jerk of the lever will cock the knuckle, but will not open the coupler, and then it is necessary for an employe to go between the cars and open it. Immediately after the accident and on the same day, the lever and coupler were examined and operated by several witnesses who testified that they were without defects and operated perfectly."

Midland R. Co. v. Fulgham, 181 Fed., 91, 93.

Following the *Patton Case,* it was held the evidence was not sufficient to take the case to the jury.

The rule *res ipsa loquitur* is merely one of evidence, *Sweeney v. Erving,* 228 U. S., 233, and there being nothing in the Federal Acts to indicate an intent to affect rules of evidence, it has been held wherever the question has been presented that they remain as before. *Smith v. Ill. Cent. R. Co.,* 200 Fed., 553; *Weiss v. Belt Ry. Co.,* 186 Ill. App., 43; *Chesapeake etc. R. Co. v. Walker's Admr.* (Ky.), 167 S. W., 128; *Ridge v. Norfolk So. R. Co.* (N. C.), 83 S. E., 762; *Bjornsen v. Nor. Pac. R. Co.,* 84 Wash., 220; *Norfolk & W. R. Co. v. Houser,* 211 Fed., 567; *Lyddy v. Louisville & N. R. Co.,* 197 Fed., 524; *Courtney v. New York etc. Ry.,* 213 Fed., 388; *Penn. R. Co. v. Knox,* 218 Fed., 748; *Helen v. Cincinnati etc. Co.* (Ky.), 160 S. W., 945; *Cincinnati etc. Ry. v. Goldston* (Ky.), 161 S. W., 246.

In any event, *res ipsa loquitur* is only applicable

> "where the circumstances of the occurrence that has caused the injury are of a character to give ground for a reasonable inference that if due care had been employed, by the party charged with care in the premises, the thing that happened amiss would not have happened."
>
> *Sweeney v. Erving,* 228 U. S., 233, 238.

Stated perhaps more concretely, it is only applicable when the nature of the accident points strongly to its cause being the defendant's negligence, and as well excludes an inference that it was otherwise occasioned. *Byers v. Carnegie Steel Co.*, 159 Fed., 347; *Lucid v. Powder Co.*, 199 Fed., 377.

Were it conceded that in the ordinary action under the Safety Appliance Act *res ipsa loquitur* is applicable, Campbell's case would not be advanced. Under the cases just cited, the utmost claimable is that when an attempt is made to use appliances under such conditions that, if not defective, they ought to work, and they do not work, it may be inferred they were defective. When a switchman walking by the side of a slowly moving car upon a smooth track, makes several attempts to work the lifting lever, and without any apparent cause it fails to operate, perhaps the not unreasonable inference is that it is defective, though it might be caused by the binding of the pin or the lever due to the position of the cars at the moment. But if at the moment he tried to work the lever the engine was pulling strongly on the cars, or they were being run at a high rate of speed, or over an uneven track, and he desisted with the one effort,

manifestly there would be no evidence, but only surmise, that the failure of the appliance to work was due to defects. And if, in addition, it appeared that the lifting device was of standard make and in general use, that it had worked perfectly until that time, and there was no slightest direct evidence of defectiveness, it could hardly be surmised, even, that the failure to work at the single attempt was due to defects.

Practically every conceivable element which would rob the mere failure of the brakes to work of probative force is present in the case at bar. The brakes were of standard pattern; in use, as the Westinghouse expert testified, on passenger equipment everywhere. Everything which care could suggest in the way of overhauling and inspection had been done, and no defects appeared. In train service every day, they worked perfectly, and but a few minutes before the collision had responded perfectly, as always, to the needs of train operation. That the application to which they failed to properly respond was not only an emergency one in the sense that it was of extraordinary force, but also because in the face of imminent peril, goes without saying. That it was also hurried and flurried is apparent. Campbell tes-

tified that from the time he left the depot he was busied with his time table and cushions, and as he looked up from his cushions he saw Number 20 approaching (18). That sight, sufficiently startling in itself, was made more agitating by the outcries of the men who were with him in the cab. "Give her the big hole" (19), "My God, look! They're coming! Give her the big hole!" (26), "For God's sake shut her off!" (29), were the exclamations which smote Campbell's ears as Number 20 met his eyes. Forthwith he "dynamited her", then busied himself with his reverse appartus, with which he was engaged when the crash came, and without any attempt to do anything with his air beyond the single first application (19).

Number 20 was 600 to 800 feet away when Campbell first saw it. He was running 30 miles an hour. Number 20 was not moving toward him as rapidly as he was toward it, but it is evident that only a few seconds elapsed between the time when Campbell first saw Number 20 and the collision. In the brief space he had for action, in the excitement about him, and the process of shutting off his power, reversing, etc., he had no opportunity, of course, for other and

more careful applications of the brakes in an endeavor to make them work. But whose was the fault that his time was so short and his need for hurry so great? The fact that his predicament caused him to act in a flurry and tumult of haste, in no way tends to negate our claim that a single "dynamite" application of brakes under such circumstances is no test of their condition. The question is, Did the failure of the brakes to work perfectly under a single emergency application, made under such circumstances, amount to evidence that they were defective? And in construing the probative force of that fact, there must always be kept in mind the fact that the brakes were of standard pattern, that they had always worked perfectly, and that there is not the slightest evidence tending to prove any defect or insufficiency in them save the single fact that they did not work perfectly under this one extraordinary application.

(e) *If all the preceding points are ruled against us, nevertheless there was no evidence that the brakes were defective unless the case is based upon the Safety Appliance Act. Campbell's contributory negligence, which at least is indisputable, was a complete defense under that Act.*

The same requests for instructions and exceptions to instructions given which were the basis for the preceding point are the foundation for that discussed under this head. Campbell was guilty of contributory negligence, if of nothing else, in leaving Coeur d'Alene without orders against Number 20. The insubstantial foundation for his case that the brakes were defective was manifestly not sufficient to take that issue to the jury unless it was supported by the positive provisions of the Safety Appliance Act, for the Liability Act only renders a railroad company liable for "any defect or insufficiency, due to its negligence", in its appliances. The duty so created is not coincident with the absolute duty imposed by the Appliance Act, but is merely the duty of reasonable care, and its breach must be proven as any negligent act must be. *Reese, Admx. v. Phil. & R. R. Co.*, 239 U. S., 463; *Seaboard Air Line v. Horton*, 233 U. S., 492. To cases solely rested upon the Appliance Act, the contributory negligence of the injured employe is a complete defense. *Schlemmer v. Buffalo etc. Ry.*, 220 U. S., 590; *Minn. & St. P. Ry. v. Popplar*, 237 U. S., 369. The jury ought therefore to have been instructed, as requested, that if it found that Camp-

bell left Coeur d'Alene in violation of his orders, its verdict should be for the defendant.

It is true that §3 of the Liability Act (35 Stat. L., 66), which provides that if an injured employe is guilty of contributory negligence the damages recoverable shall be diminished, etc., concludes with the proviso that an injured employe shall not be held guilty of contributory negligence where the violation of any statute enacted for the safety of employes contributed to the injury. The section is inseparable, and manifestly was only intended to apply to cases brought within the Act of which it is a part. It does not apply to cases which rest entirely upon the Appliance Act. The state of the law, as we read the decisions of this Court, is this: An employe who is injured while using any of the limited number of appliances affected by the Appliance Act, may recover under that Act without proving more than that he was injured as a result of a defective appliance, but his contributory negligence is a complete defense to the action. On the other hand, he may sue under the Liability Act, although the appliance in the use of which he was injured was one affected by the Appliance Act, but if he does he must not only prove that

the appliance was defective, but that its deficiency was due to the negligence of his employer. As compensation for the enlarged proof which he must make in order to get his case to the jury, however, his contributory negligence is not a complete but only a *pro tanto* defense, and none at all if the appliance was one covered by the Appliance Act. The two statutes overlap at points, but the common territory is affected differently by each statute. The case is like that of a State in which the common law rule of negligence prevails, but a statute has been passed affecting the rule. The fact that a plaintiff might have maintained a common law action does not deprive him of the right to sue under the statute, but if he counts on common law negligence, he cannot claim the benefits of the statute. 5 *Labatt, Master & Servant* (2d Ed.), §1667. As expressed in *Welch v. Waterbury*, 120 N. Y. Supp., 1059:

> "There is no such thing as a blending of a common-law action for negligence resulting in personal injuries and an action under the employer's liability act; portions of a common-law action cannot be pieced out with the provisions of the employer's liability act and produce a good and valid judgment, and that is exactly what has been attempted here."

It was said in *Flessher v. Carstens Packing Co.*, 81 Wash., 241:

> "We have in this state a statute known as the factory act, providing for the guarding of dangerous machinery. Any workman injured through the negligence of his employer because of the unguarded condition of dangerous machinery could, until the workmen's compensation act went into effect, maintain a common law action for negligence, or he might sue under the factory act. But having selected his form of action, he must abide by it. He could not found his action upon common law negligence, and recover for a violation of the factory act."

See, also, *Wiser v. N. W. Imp. Co.*, 86 Wash., 433.

It may not always be easy to say whether a case is brought under the Liability Act or the Appliance Act when the injury is due to a defect in appliances covered by the Appliance Act. There is no such difficulty in the case at bar. Manifestly there was not sufficient evidence to take the issue of defective brakes to the jury if Campbell was required to prove not only that they were defective or insufficient, but that they were so by reason of the Company's negligence. Only by invoking the Appliance Act, and the absolute duty it imposes, was there a semblance of a case made on that issue. Campbell, then, got the

issue of defective brakes to the jury by claiming under the Appliance Act, and having so gotten it there, and obtained a verdict of defective brakes from the jury in consequence of the absolute duty it creates, he certainly will not be permitted to return to the Liability Act and rest his case upon it in order to escape the defense of contributory negligence which the Appliance Act permits.

If any point under the first head of this brief is held well taken, we conceive ourselves entitled to a reversal with directions to enter judgment for defendant upon the special findings under the Washington practice. Otherwise a new trial seems required.

Respectfully submitted,

W. G. GRAVES,
Attorney for Plaintiff in Error.

F. H. GRAVES,
B. H. KIZER,
Of Counsel.

IN THE

SUPREME COURT

OF THE

United States

October Term, 1912

No. 39

SPOKANE & INLAND EMPIRE RAILROAD COMPANY,
Plaintiff in Error,

vs.

EDGAR E. CAMPBELL,
Defendant in Error.

In Error to the United States Circuit Court of Appeals for the Ninth Circuit.

REPLY BRIEF FOR PLAINTIFF IN ERROR

W. C. GRAVES,
Attorney for Plaintiff in Error.

F. H. GRAVES,
B. H. KIZER,
Of Counsel.

IN THE

SUPREME COURT

OF THE

United States

October Term, 1915

No. 325

SPOKANE & INLAND EMPIRE RAILROAD COMPANY, Plaintiff in Error,

vs.

EDGAR E. CAMPBELL, Defendant in Error.

In Error to the United States Circuit Court of Appeals for the Ninth Circuit

REPLY BRIEF FOR PLAINTIFF IN ERROR

Scope of Inquiry.

The argument that the Court will look no further into the questions presented here than to determine

whether plain error was committed in the lower courts, proceeds, of course, upon an utter misapprehension of the decisions of this Court relative to the consideration which will be given questions presented in cases of this character coming here from a Circuit Court of Appeals. In suits based upon a Federal act, text and spirit alike of the Judicial Code make this Court the final arbiter of all questions going to the meaning of the act. Into mere questions of general law arising in such a case, not involving the interpretation of the act, the Court will look no further than to ascertain whether plain error was committed. *Southern Ry. Co. v. Gadd*, 233 U. S., 572, 576-77; *Yazoo & M. R. Co. v. Wright*, 235 U. S., 376. But of course that rule is not applicable to questions the decision of which turns upon the particular construction of the Federal act upon which the suit is based, and every question in this case is in that category. Principles of general law are discussed only for the purpose of aiding in the ascertainment of the scope and purport of the Federal acts involved.

Special Findings and Proximate Cause.

We are apparently supposed to rest the claim that judgment should have been rendered for the defendant

upon the special findings on the doctrine of proximate cause.

Of course we do not take that position. The doctrine of proximate cause is not involved, and the reason for the stout attempt to drag it into the controversy is not apparent. The sole point we make upon the special findings is that they establish that Campbell left Coeur d'Alene against the Company's orders. If they do he was not in the course of his employment when he was injured, and he cannot recover because the only claim he makes to recover is upon a breach of duty owed to him while engaged in his employment. The air brakes may have been ever so defective, but if Campbell was not in the discharge of his employment when he was injured no right of recovery can be predicated upon their condition, for the Company owed him no duty with respect to them. Obviously the doctrine of proximate cause has not the slightest relevancy to the question of whether Campbell was engaged in his employment, or to the results which follow if it appears he was not. So that if it appears from the findings that Campbell did leave Coeur d'Alene in violation of orders, the point we make is presented, regardless of the fact that the jury also found, either by intend-

ment from the general verdict or specially, that the air brakes were defective.

The Orders Which Campbell Violated Limited the Sphere of His Employment.

On some theory, the nature of which is not apparent and is not disclosed, it is said that whether Campbell did in fact leave Coeur d'Alene in violation of his orders is an open question.

A more barefaced attempt to avoid the effect of a direct finding is not conceivable. The principal charge of negligence in the complaint is that Campbell was given an order at Coeur d'Alene to run to Spokane, meeting and passing Number 20 at Alan, and that he came in collision with Number 20 before reaching Alan (2). Issue was joined upon the nature of his order (4), and defining the issue yet more sharply, it was pleaded affirmatively in the answer that Campbell had no right to leave Coeur d'Alene until Number 20 came in unless he had orders against it; that he had no such order, but only an order to meet a special train at Alan; and that the collision was caused by his leaving Coeur d'Alene in violation of his orders (5-7). Campbell alone testified that he was given an order to

meet Number 20 at Alan. The overwhelming evidence produced by the Company, including the copy of the order which was given Campbell, and which was found among the wreckage by a bystander the day after the collision (41), proved that the order given Campbell was to meet Special 4 East at Alan. The trial judge instructed the jury, distinctly and emphatically, that the first issue for it to determine was whether Campbell was given an order to meet Number 20 at Alan, or whether his order was to meet Special 4 East there (53-54). To render impossible any obscuration of the issue, the trial judge submitted special findings upon the subject of Campbell's order, again directing the jury's attention to the sharp drawn issue concerning the order which it was required to pass on (56-57). Upon that issue the jury decided without equivocation that the order Campbell received was the one pleaded and proven by the Company, and that his injury was proximately caused by his act in leaving Coeur d'Alene in violation of his orders (11-12). Futility is the politest term which can be applied to counsel's endeavor to ignore the findings and treat the question of whether Campbell violated his orders as an open one.

At sundry places it is sought to be insinuated that Campbell was given a verbal order to leave Coeur d'Alene by the conductor of his train, and that the conductor was his superior officer, wherefore Campbell was justified in leaving.

The conductor testified that when Campbell asked him if he was ready he said "Yes, let her go," meaning to move down the yard to the wye and stand there until Number 20 came in, as was then the custom when a train was due in Coeur d'Alene, upon the arrival of which the other train was to proceed Spokane-wards (34-35). But it is disingenuous to attempt to make of this incident a justification for Campbell's act. The Company's rules, with which Campbell was thoroughly familiar, provide that "Responsibility for protection of a train rests with Conductor and Motorman" (36). Campbell distinctly admitted that he had no right to leave Coeur d'Alene without special orders against Number 20.

> "When I pulled out of Coeur d'Alene on July 31st, it was my duty to keep clear of No. 20, if I had not a special order telling me where to meet it. If I did have a special order telling me where to meet No. 20, then I would meet it at that place. If I had not a special order telling me where to

meet No. 20, then it was my duty to be at a place where No. 20 could pass in safety" (20).

Campbell himself disposed of any notion that he left Coeur d'Alene in consequence of what the conductor said by solely basing his act upon the receipt of a special order to meet Number 20 at Alan, and adding that the conductor "cannot give you orders to pull out unless you have orders to pull out" (18). And the trial judge put the conductor's direction out of the case by instructing the jury that Campbell admitted he had no right to leave Coeur d'Alene unless he had written orders fixing a meeting point with Number 20 at some other place, and admitted "that the order of the conductor directing him to depart would not authorize him to do so" (53).

Finally it is urged that the utmost that can be claimed concerning Campbell's act is that he negligently disobeyed an order while doing what he was employed to do: operate a train, and therefore it was no more than a negligent discharge of his duty.

Counsel sadly misapprehend the principle involved. Campbell should not be denied compensation (adopting the language of Lord Dunedin in the *Plumb Case*, cited in our opening brief) because "he was guilty of serious

and wilful misconduct, but because the thing done, irrespective of misconduct, was a thing outside the scope of his employment." Campbell's employment is not stated correctly. It was not to run a train, but to run a train when and where he might be ordered to do so by the Company. In the *Parker Case* (cited in our opening brief) the county court thought the employment was to dig as many flints as the employe could, and therefore his act in digging where he had been directed not to work was only serious and wilful misconduct (in the language of the British Compensation Act) which would not defeat his right to compensation. The Court of Appeal held otherwise, saying the employment was to dig as many flints as he could outside of the place where he had been ordered not to work. In the case at bar the Company had established a system of train operation under which Campbell's train, a special, was required to remain in Coeur d'Alene until Number 20, a regular train, came in; provided, of course, a special order was not given him to go to some other point on the line to meet Number 20. In the absence of such an order, as Campbell himself admits, his duty to remain at Coeur d'Alene until Number 20 came was as imperative as though a direct

order to that effect had been given him. Obviously his employment was not to immediately start for Spokane with his train, but to remain at Coeur d'Alene until Number 20 came, then run to Spokane in accordance with his orders. The case as it is does not differ from what it would have been if Campbell, directed to take his train to Spokane, had instead run it out on another line to Hayden Lake, another terminus. His act was as foreign to anything he was employed to do as though after working hours he had taken a train from the siding and set off for Spokane. We repeat that in railroad employment more than in any other the employer must be able to establish a system and require every employe to fit into his allotted place in the system and do the thing set him to do. His employment is not merely to work for the company; it is to work when and where directed. And we insist that an employe who takes his train from a terminal before the time he has been directed to start, thereby disarranging the system which must be observed if safety is to be had, is no more doing the thing he was employed to do than if he took the train out on one line when he had been ordered to take it over another, or took it out after working hours for his own pleasure.

There is not a mere violation of a rule relating to the manner in which the duties of an employment shall be discharged; there is a stepping wholly outside the employment through the disregard of a rule determining when the employment shall commence and where be carried on.

In the recent decision in *Great Northern Ry. Co. v. Wiles*, No. 196, October Term, 1915, decided March 20, 1916, the Court pointed out the grave responsibilities of trainmen, and the serious results which may ensue from their disregard of rules formulated for the safety of passengers and trainmen. The precise point here involved was not there considered, but there is much in the opinion which is applicable to this case. There was here realized, in the eighteen passengers killed and many injured, the terrible consequences which were referred to in the *Wiles Case* as probable of result when a trainman made himself a law unto himself. As in the *Wiles Case*, there is here nothing to extenuate Campbell's conduct. "There was nothing to confuse his judgment or cause hesitation. His duty was as clear as its performance was easy." He knew Number 20 was approaching Coeur d'Alene. He knew he must not leave until it reached there unless he

received a written order fixing a meeting point with it. He received a plain and legible order, which was read and understood by everyone else concerned. He read it at his leisure, and asserts that he understood it. That he did read it is apparent, for he repeated the order verbatim, save that in lieu of the words "Special 4 East" as the order was written, he substituted the words "Number 20." It may be that through inattention the words were wrongly recorded in his brain; it may be that in his absorption with his cushions and time table, or with his new-made railroad friends who were in the cab with him, he forgot Number 20 when he started his train to move it down the yard. The explanation is immaterial. There was nothing to prevent his comprehension of the situation. Had he read with attention and acted with deliberation he could not have failed to understand. The safety of many people depended upon his reading the order attentively and running his train heedfully, and the terrible sacrifice of life and limb which resulted from his act cannot be excused by the plea that he read perfunctorily or ran his train heedlessly.

Applicability of the Air Brake Provision of the Appliance Act.

We certainly do not claim that a railroad is not a railroad because it employs electricity as a motive power. In *Spokane & Inland Empire R. Co. v. United States*, it was distinctly admitted that the automatic coupler and grab-iron provisions of the Appliance Act were applicable to all cars run upon the Company's lines save such as came within the exception of cars "used upon street railways." Our sole contention in this case is that the use of the words "locomotive," "locomotive engine," and "engineer," in the sections of the Act providing for air brake equipment indicate that Congress did not intend to extend the requirements of air brake equipment to electrically propelled trains. The conclusion that it did not is much strengthened by the continued use of those words in late legislation relating to air brake equipment, and their use in an order relating to such equipment made by the Interstate Commerce Commission under Congressional authority; all of which was after electricity had become a recognized motive force in the operation of railroads such as the Company's. The contention has ample

support, also, in the decisions of the State Courts of high authority which are cited in our opening brief.

No Evidence That the Brakes Were Defective.

With respect to this point, as to all others urged, our position is misconstrued by counsel. Proof of duty breached is essential to the establishment of liability, whatever the degree of duty owed. The burden was upon Campbell to show that the brakes on his train were defective. Circumstantial evidence, if otherwise sufficient, was as good for that purpose as any other. But clearly a railroad company is not an insurer that its appliances shall not fail from any cause, and obviously it will never be held that a railroad company is liable to an employe for the failure of an appliance when it failed because of his improper use of it. Campbell distinctly admitted that some of the several causes which he suggested as possible for the releasing of the brakes might have been due to an improper emergency application (25). That testimony leaves several causes suggested for the failure of the brakes, one as probable as another, and for some of which, at least, liability could not attach to the Company. The case is therefore within *Patton v. Texas & P. R. Co.*, 179 U. S., 658.

But even if the hypothesis that the brakes gave way under the strain of an improper application is eliminated, there is not sufficient evidence that they were defective. It needs no expert evidence that an air brake system is made up of rather complicated mechanism: reservoirs, valves, pumps and pipes, which must coordinate to secure proper results. Everyone knows, too, that the simplest mechanism, in perfect condition, may not work properly with a single hurried effort. Campbell made but one application of the air. It was an extraordinary application, of unusual force, and he at least inferentially admits that some of the parts may have given way because he applied it too hard, or in some other respect improperly (25). He made the application as he was startled by the sight of the other train, with the two trains rushing toward each other, and with the cries of his companions in the cab to "Give her the big hole!" "For God's sake shut her off!" ringing in his ears. It will hardly be supposed that it was a cool and careful application, and yet, when the brakes did not hold under it, he made no further effort to work them. Perhaps he judged soundly, having but a second or two for action, in abandoning his attempt to stop the train with the brakes with the single appli-

cation and giving his attention to the reversing apparatus. That is beside the question, for the question is whether the failure of the brakes to respond perfectly to the single application made under such circumstances is evidence that they were defective. The probative force of that circumstance is not increased by the fact that through his violation of orders Campbell had put himself in a situation where he had not time to coolly endeavor to work the brakes.

Even in the case of such simple mechanism as a coupler, the Court has never considered that a single unsuccessful attempt to lift the pin, though made under normal conditions, was evidence that the device was defective. In *Minn. & St. P. Ry. v. Popplar*, 237 U. S., 369, it was held that repeated efforts to lift the pin, coupled with evidence that after the injury the coupler was found to work with difficulty, and should have been reported as a "bad coupler," was enough to take the case to the jury "upon the question whether, in fact, the coupler was defective." The decision trends, we think, toward the decision of the Circuit Court of Appeals for the Eighth Circuit in *Midland R. Co. v. Fulgham*, 181 Fed., 91: that a single unsuccessful effort to work a coupler is no evidence that

it was defective. In any event, the complicated mechanism of an air brake system considered, if the Company is to be held liable because the brakes on Campbell's train did not respond properly under the circumstances appearing, it ought not to be on any rule of evidence but on the ground that the Company was an insurer that its appliances would not fail under any conditions.

Instructions.

We think counsel hardly mean what they say when they suggest that the refusal to give the instructions requested by the Company concerning which error is assigned was not prejudicial because they "were given by the trial court in other words." Had counsel remarked the instructions concerning which error is assigned and the points made upon them, they would have observed that the effect of the requested instructions was to withdraw from the jury the issue of defective air brakes, and that the point made upon them is that the issue of defective brakes should not have been submitted to the jury because, firstly, no duty was owed Campbell to equip the train with perfect brakes, and, secondly, if it is held such a duty existed, that there was no evidence, as matter of law, that the

brakes were in any way defective. Inasmuch as it is patent that the sole ground upon which the jury awarded damages was that of defective brakes, it will hardly do to say that the Court gave the requested instructions in another form of words.

Upon all other questions presented, we submit on our opening brief.

Respectfully submitted,

W. G. GRAVES,
Attorney for Plaintiff in Error.

F. H. GRAVES,
B. H. KIZER,
Of Counsel.

SUPREME COURT
OF THE
United States

October Term, 1915
No. 325

SPOKANE & INLAND EMPIRE RAILROAD COMPANY,
Plaintiff in Error,
vs.
EDGAR E. CAMPBELL,
Defendant in Error.

In Error to the United States Circuit Court of Appeals for the Ninth Circuit

BRIEF FOR DEFENDANT IN ERROR

H. LOWNDES MAURY,
Attorney for Defendant in Error.

E. H. BELDEN,
W. C. LOSEY,
H. E. NEWTON,
Of Counsel.

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CARD 3

SUBJECT INDEX

TABLE OF CASES.

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BRIEF FOR DEFENDANT IN ERROR

Note: In this brief, plaintiff in error will be referred to as the Company, and the defendant in error by his name. Figures in brackets are page references to the transcript.

STATEMENT OF THE CASE.

A short statement of some of the facts not fully covered by the statement of the Company, may be of assistance to the Court.

The Company, a corporation organized under the laws of the State of Washington, operates a line of railway between the City of Spokane, in the State of Washington, and the Town of Coeur d'Alene, in the State of Idaho, and is engaged in business as a carrier of interstate commerce between the points above mentioned. In the operation of the railway, electricity is used as the motive power, instead of steam. Campbell was on the 31st day of July, 1909, operating one of the trains for the Company as motorman, or engineer. The train consisted of what is known as a motor car and two other cars, all attached, making a three-car train. On the 31st of July, 1909, Campbell arrived with his train at the town of Coeur d'Alene, the eastern terminus of said railroad, having operated said train from Spokane to Coeur d'Alene. At about 4:30 p. m. and shortly after his arrival at Coeur d'Alene, he brought his train in position to return to Spokane. He received

written orders from the dispatcher for the running of his train, and verbal orders from the conductor, Whittlesey. Immediately after the written orders were handed to Campbell, he was ordered by his conductor to depart, and Campbell started his train from Coeur d'Alene, and had proceeded a short distance when he discovered a train approaching on the same track, from the opposite direction. Upon seeing the approaching train, he applied the emergency brakes. The brakes held at first, and perceptibly retarded the speed of the train, when of a sudden, the brakes released and the train "kicked" forward, upon the brakes refusing to work (18-19). Campbell testified:

> "Upon seeing the approaching train, I did what we term in railroading, 'dynamited' her. I gave all the air I had. It caught hold and was making a stop very nicely, when all of a sudden, it released and the train shot forward. I then reversed my motor and I suppose it cleaned the line because I did not have any power immediately after I reversed. There was no hand brake in the cab. If the air had worked properly, and held when the first application was made, I could have stopped my train before running into the other train. If the brakes had been working properly, I could have stopped my train in about 600 feet, probably less than that. I was running about 30 miles an hour when I applied the air * * * (18).

"When I first applied the air, it took hold and held for approximately, I should judge, for 35 or 40 feet, then let loose. Everything released without any action on my part. After the air released, there was nothing I could do to stop my car after reversing it. I held my hand on the jack. The practical way of operating the car in the case of emergency where you have occasion to reverse a motor, is to throw your jack first, because the momentum of your car after you throw your reverse, throws practically enough momentum there to take hold a little bit. I pulled the jack first, then pulled my reverse back, and after I did that, I saw we were getting pretty close together, and I gave my car and the controller a point, and threw in my jack to get my power from the trolley wire to cause friction in my motor to get my motors in the reverse bearing. I was in that position when we struck the other train. There was nothing else I could do to bring the car to a stop. * * * When the air brakes are in proper working order, they do not release after the air is applied, unless they are released by the party controlling it, and they were not released by me." (19).

Ed Trudell, brakeman on Campbell's train, testified:

"My attention was first directed when Campbell set the air, and I went back and looked out the rear platform, and saw the other train coming and jumped off. I went back, because Campbell set the air. He set the air unusually hard, so hard I wanted to see what was the matter. I was in the front car about

six feet from the rear platform, going up to the front end to see what orders they had * * * The emergency checked the train of course. I felt it go on there, his setting the brakes so hard, and I got busy getting to the back end to see what was the matter." (26).

Edward L. Dixon testified:

"I saw Campbell when he started. I was in the front end of the motor car about three or four feet from him. The train started from Coeur d'Alene about 4:30. It must have gone a mile and a half or two miles when I noticed another train coming. My attention was directed to it by Mr. Beck saying: 'My God, look, they are coming.' Then he said: 'Give her the big hole.' The trains were then about 200 yards apart. Campbell applied the emergency brake and it held for a few seconds, and then leaked off. * * * After the emergency failed to work, he was trying the (to) hold the jack. I was formerly a railway employe, and am familiar with air brakes similar to the one on his train. I know how air brakes work when they are in proper condition. The air brakes on this train did not work as if they were in proper condition. If these brakes had been in proper condition, that train could have been stopped in about 225 feet. I was standing so close to the door because the train was so crowded that was the only place we saw where we could ride. I saw orders delivered by Mr. Whittlesey (the conductor), to Campbell at Coeur d'Alene and heard remarks made when he delivered the order. First Campbell said: 'Shall we go?' Whittlesey said: 'Well, we had just as well go, I guess.' That was in Coeur d'Alene. Imme-

diately after that, Campbell got on the train and pulled out." (26-27).

The witness Dixon was a locomotive fireman on the Northwestern Railroad for about four years, and while there, had occasion to use air brakes and had himself stopped trains with them. (28).

Wm. Beck testified that he had been a railroad man employed as brakeman and conductor on the Northwestern Railroad for about seventeen years; that he was standing in the motorman's door on the left side next to Dixon when he noticed the other train approaching, and called Campbell's attention to the approaching train. "Campbell pulled his air immediately, and it jumped off or something. It just took hold for a short length of time, and then the car plunged ahead. * * * They went probably 100 or 150 yards after the air began to leak before I jumped." (28-29).

James Delaney testified that he was motorman on Regular No. 20, and saw Motor No. 5 approaching near Gibbs, and the trains were about 800 feet apart when he first saw it. He applied the emergency brake on No. 20, and brought his train to a stop before the collision. That Motor No. 20 was stopped within a distance of 200 feet. (31).

Whittlesey, the conductor on Campbell's train, testified that he felt the air applied just before the collision which occurred a mile outside of Coeur d'Alene. (34).

Phillip Beck testified that he was a passenger upon the train, riding in the motor car in the rear seat, and was talking when he felt the air brakes applied giving such a jar that he stuck his head out of the window, and saw another train coming. He thought Campbell could stop the train, but the air held for an instant, then it released and the train went on. (30).

Henry John Robinson, called by the Company, testified that if the brakes were in proper working condition, a motor car and two trailers going at a speed of 30 miles per hour on a one per cent. grade, an application of the brakes in an emergency, would stop a train, in his opinion, between 200 and 300 feet, not more than 300 feet. (50).

There is no testimony whatever in the record but that the brakes were properly applied by Campbell, and that if they had worked, the collision in which Campbell and others were injured, would have been avoided.

There is a conflict in the testimony as to the orders given Campbell, for the running of his train, as indicated by the testimony of Campbell and other witnesses.

Campbell was severely injured; both legs were broken, six inches of bone being removed from one leg, so that one leg is six inches shorter than normal, and the bones in the other leg where broken, overlap so that that limb is three inches shorter than normal. He also suffered injury to his hearing and his injuries are permanent. (19-20). At the time of Campbell's injury, he was earning an average of $125.00 per month.

ARGUMENT.

Scope of Inquiry.

It may be of advantage in the beginning of this brief to make some suggestions as to the scope of the inquiry which will be made by the Federal Supreme Court, in view of the decisions and practice applicable. It will be remembered that this case was brought in the Federal District Court under the Federal Employers Liability Act. A trial was had before a jury, and the jury returned a verdict for Campbell in the sum of $7500.00. Afterwards

in due course, a motion for judgment *non obstante veredicto* was made by the Company. The trial court denied this motion (13). Then in the course of proceedings, followed a motion for a new trial which was duly considered by the trial court and denied. (16). (Original 25). Thereupon a writ of error was taken to the Circuit Court of Appeals. The Circuit Court of Appeals considered the issues involved, and reviewed the evidence as presented by the record and affirmed the judgment of the lower court (64), and this cause is now before the Federal Supreme Court because of the statute permitting writ of error where the Federal Employers Liability Act is called into question. *217 Fed. 518.* We do not understand, however, that the Federal Supreme Court in considering the cause, is called upon or will, go into the record further than to consider whether plain error has been committed in relation to the Federal Employers Liability Act. This court will consider only such questions on writ of error to the Circuit Court as may be involved in the construction of that Act, and as to all other questions raised, will consider the decision of the Circuit Court as *final, binding* and *conclusive.*

Aside from the statute applicable in such cases, it is reasonable that the Federal Supreme Court should not be required on writ of error, to the Circuit Court of Appeals, to consider minutely and in detail, all the questions of law and fact which might have been raised during the course of the trial, before the cause reached the Federal Supreme Court, but it will be assumed that the Circuit Court of Appeals and the trial court have fully considered, decided and determined all questions of law and fact in the case, and that their opinion is conclusive, except as to the questions involved in the construction of the Employers Liability Act. For this reason, it is customary and good practice to abbreviate the record presented to the Federal Supreme Court, eliminating and discarding therefrom such evidence and proceedings had on the trial, and prior to the case reaching the Federal Supreme Court, as affect the questions other than those for consideration by the Federal Supreme Court.

In *Yazoo & Miss. Valley Ry. vs. Wright,* 233 U. S., p. 376, this Court through Chief Justice White, in a memorandum opinion, suggests:

"While this second appeal rests on the Employers Liability Act, there is no contention as to its meaning. (125 C. C. A., 25; 207 Fed., 281); hence we need only determine whether plain error was committed in relation to the principles of general law involved."

This is in line with the following decisions of this Court, to-wit:

Chicago Junction Ry. Co. vs. King, 222 U. S., 222.
Seaboard Air Line R. Co. vs. Moore, 228 U. S., 433.
Chicago, R. I. & P. R. Co. vs. Brown, 229 U. S., 317.
Southern R. Co. vs. Gadd, 233 U. S., 577.
Behn, Meyer & Co. vs. Campbell & Go Tanco, 205 U. S., 403.

In *Chicago Junction Ry. vs. King, supra,* the Court says:

"That although we have jurisdiction to review, because the cause of action, as stated in the pleadings, rested upon the safety appliance law, the questions now presented, in a broad sense, are of a character which ordinarily it was the purpose of the judiciary act of 1891 (26 Statutes at L. 826, Chap. 517 U. S. Comp. Stat. 1901, page 488), to submit to the final jurisdiction of the Circuit Court of Appeals. Under the conditions just stated, we do not think we are called upon to scrutinize the whole record for the purpose of discovering whether it may not be possible by a minute analysis of the evidence, to draw therefrom in-

ferences which may possibly conflict with the conclusions of the courts below as to the tendencies of the proof. We are of this opinion because in this, and cases like it, that is, in cases where the conditions are in all respects identical with those here presented, we think our whole duty will be performed by giving to the record such examination and consideration as may be necessary to enable us to determine whether plain error was committed by the court below in any of the particulars complained of. In the discharge of such duty in this case, in view of the full opinion of the Circuit Court of Appeals, and in the light of the adequate examination which we have made of the record, as we find nothing giving rise to a clear conviction on our part that error has resulted from the action of the court below, it follows that the judgment of the Circuit Court of Appeals must be, and is, affirmed."

The questions of assumption of risk and contributory negligence, applicable to the case at bar, as affected by the Employers Liability Act, have been passed upon by this Court so frequently, that there can now be little question of the proper construction to be placed upon the Act; and it would seem to us that, in view of the record, and the decision in the case of *Grand Trunk & Central Ry. Co. vs. Lindsay,* 233 U. S., 42, there remains but one question for the consideration of this Court, and that

is, whether the Act in question applies to a railway company engaged in interstate commerce, whose motive power is electricity instead of steam.

The Provisions of the Federal Statute with Reference to Brake Provisions, etc., are Applicable to Electric Railways.

The question of the application of the Federal statutes, with reference to the use of automatic couplers, brakes, etc. (32 Statute, 943) by electrically equipped and operated railways, is one upon which we find no decision of this court for guidance.

However, in case No. 136, October term, 1915, before this Court, and now awaiting decision, this same question was involved wherein this same plaintiff in error was plaintiff in error, in an action brought by the United States on account of the failure of the Company to equip its trains as provided for by said Act. *Spokane & Inland Empire Ry. Co. vs. The United States,* No. 136., 210 Fed., 243.

It would appear from the briefs and record in that case, however, that the principal argument on behalf of the Company as to why the Act should

not apply to it, was because a small part of the railway system was operated over the streets of the City of Spokane, over a street railway track. In the case at bar, that question has not been raised, and as far as the issues to be determined by this Court are concerned, as indicated by the record, the question is squarely presented, as to whether or not the Act applies to a railroad engaged in interstate commerce whose motive power is electricity, with like force and effect as though the motive power was steam. It is conceded that a street railway such as is usually implied by the term, does not come within the operation of the statute, as it is excluded by the Act, but it is not contended by the Company that the railway upon which Campbell was injured, was operated as a street railway.

We must look to the object and purpose of the Act of Congress in the passage of the Act in question, in order to arrive at a true conclusion of the application of the Act. In the case of *Schlemmer vs. Buffalo, R. & P. R. Co.*, 205 U. S., 1, this Court said:

> "The object was to protect the lives and limbs of railway employees by rendering it unnecessary for a man operating the couplers to go between the ends of the cars. These con-

> siderations apply to shovel cars as well as to locomotives, and show that the words 'used in moving interstate traffic,' should not be taken in a narrow sense."

As suggested, there appears to be no decisions where the Act has been interpreted in reference to electric railroads, and the question is one of first impression, and must be decided from an examination of the statute itself and on principle.

The purpose of the Safety Appliance Act of 1893 is set forth succinctly in its title:

> "To promote the safety of employees and travelers upon railroads by compelling common carriers engaged in interstate commerce, to equip their cars with automatic couplers and continuous brakes, and their locomotives with driving wheel brakes and for other purposes."

The Safety Appliance Act of 1893 was amended in 1903, and Section 1 of said Act, as amended, is as follows:

> "To apply to common carriers by railroads in the territories and the District of Columbia, and shall apply in all cases whether or not the couplers brought together are of the same kind, make or type, and the provisions and requirements hereof and of said Acts relating to train brakes, automatic couplers, grab irons and the height of draw bars, shall be held to apply to all trains, locomotives, tenders, cars and sim-

> ilar vehicles used on any railroad engaged in interstate commerce * * * and to all locomotives, tenders, cars and similar vehicles used in connection therewith, excepting those trains, cars, locomotives, exempted by the provisions of Section 6 of said Act of March, 1896, as amended by the Act of April 1, 1896, or which are used upon street railways."

It is argued that the Act should not be held to apply to electric railway trains because when the Act was adopted, electricity as a propulsive power was in its infancy, and was used only in an experimental way on a few street car lines, and that there were no carriers engaged in interstate commerce business using electricity as a propulsive power. Argument of counsel fails when we read the concluding words of paragraph 1 of the Act, which expressly exempts trains, cars and locomotives used upon street railways. Can it be successfully argued that Congress expressly excluded trains used on street railways from the provisions of the Act because it was feared that the Act might, by interpretation, be applied to them, and did not exclude electric trains because there was no liability of their being included? We know of no language which could better bring within the operation of the Act, an electrically operated train, than the lan-

guage used in the Act, "*and to all locomotives, tenders, cars and similar vehicles used in connection therewith.*" It would seem to us that Congress in the amendatory act of 1903 had in mind the very character of train operated by Campbell, which was not covered by the original Act and provided for the application of the Act to such trains when it used the words "*cars and similar vehicles.*"

The Safety Appliance Act has been given a liberal construction by Federal Courts that the intent of Congress might be effectuated. The case of *Chicago, Milwaukee & St. P. Ry. Co. vs. United States,* 165 Fed., 423, holds that the statute applies to steam shovel cars, consisting of machinery bolted on a platform and supported by trucks. *Johnson vs. Southern Pacific Co.,* 196 U. S., 1, holds that *any car* means all kinds of cars running on rails, including locomotives.

U. S. vs. Chicago N. W. Ry., 157 Fed., 611, holds that the statute applies to an engine which hauls, but does not carry freight.

In *Winkler vs. Phil. & R. R. Co.,* 53 Atl., 90, it was held that the tender of a locomotive engine engaged in interstate commerce, is a car, and is within the scope of this Act.

The Circuit Court for the Ninth Circuit, in the case of *Spokane & Inland Electric Ry. Co. vs. U. S.,* being the same company here involved, it seems to us, has properly decided the question of the application of the statute, and in view of that decision, and the decisions cited therein in sustaining the Act as applicable to electrically operated trains, it seems further comment is unnecessary. *Spokane & I. Elec. Ry. vs. U. S.,* 210 Fed., 243.

However, there are some State decisions which are in point, and may be of assistance to the Court in determining the question. The case of *Kent vs. Jamestown Street Ry. Co.,* 98 N. E., 664 (N. Y., 1912), is by analogy applicable to the facts in this case. There, plaintiff's intestate, a motorman engaged in running an electric car, was killed in a collision with a similar car, running upon the same track in the opposite direction in violation of a signal that had been given to the motorman in charge of that car. Under Section 64 of the Railroad Law, the employee of the defendant, having physical control or direction of the car that caused the collision, was not a fellow servant of the intestate. The Court stated as follows:

"There is but one question requiring our consideration, and that is, whether Section 64 of Railroad Law is applicable to a railroad organized as a street service railroad corporation."

Section 64 of Railroad Law provides:

"That in all actions against railroads for personal injuries to or the death of an employee by the negligence of the corporation or its employees, every employee shall have the same right and remedy as are now allowed by law and * * * if an employee engaged in the service of any such railroad corporation shall be injured by any defect in the condition, ways, works, machinery, tools or implements, or any car, train, locomotive or attachment thereto belonging to the corporation, when the defect could have been discovered by reasonable care, the corporation shall be deemed to have knowledge of the defect."

The Court in the above case, held that section was applicable to the street service railroad corporation, and in discussing the proposition said:

"The defendant is organized as a street surface railroad corporation, and is engaged in running cars in the City of Jamestown, and to and from adjoining villages, by electric power conveyed by trolley wires. By the express terms of said section of the Railroad Law, it is applicable to 'all actions against a railroad corporation, foreign or domestic, doing business in this State, or against a receiver thereof.' It is not by its terms in any way restricted or lim-

ited to particular railroads, or to railroads organized for a particular purpose. * * * In 1906, when that section was added to the Railroad Law, railroads organized as street surface railroads had extended their mileage and so modified their manner of doing business that in many respects they resembled steam railroads. Some steam railroads have changed their motive power upon all or a part of their routes to electricity, and motormen are necessarily employed by railroads organized as steam railroads; and some of the employees of railroads are engaged during a portion of each day on cars propelled by steam, and during another portion of the day upon cars propelled by electricity. Railroads organized and known as street surface railroads frequently extended their routes outside and beyond the streets of cities and villages, and from village to village, and from city to city. They run their passenger and freight cars at a rate of speed quite equal to that of an ordinary express train on a steam road, and stop at designated places.

"The reasons for changing the common law rule relating to negligence by a fellow servant are by many considered as controlling when applied to employees of street surface railroads as to employees of steam railroads. Electric and other cars commonly used by street surface railroads generally stop more frequently and run through less guarded territory than the cars of an ordinary steam railroad; but the whole system of doing business by street surface railroads has become intricate, and a system of signals and rules upon such roads, which must be literally obeyed, is becoming, if it is not now,

> as important as are signals and rules and their obedience upon steam roads."

In view of the liberal construction placed upon the Safety Appliance Act, by numerous decisions, it is evident Congress, by the amendment of 1903, intended that the Act should apply to all railroads engaged in interstate commerce, *except* street railways, and those expressly excluded by Section 6 of the Act as amended in 1896.

SPECIAL FINDINGS.

The purpose of submitting special findings to a jury to be answered in addition to returning a general verdict, is that the Court may ascertain *facts* upon which the general verdict is based, and when special findings upon *all* material points are submitted to the jury, and the answers thereto cannot be reconciled with the general verdict, the decisions hold that the special findings control. However, four things must concur for the special findings to control the general verdict, to-wit:

(a) There must be a special finding of all facts necessary to support the contention of the party moving against the general verdict.

(b) These special findings must be in accord with each other.

(c) They must be irreconcilably inconsistent with the general verdict.

(d) The special findings must be findings of fact, and not mixed questions of law and fact or conclusions. The special findings submitted in this case are as follows:

1. "Did the plaintiff Campbell receive, before leaving Coeur d'Alene, train order 53, reading as follows:

'Train Order No. 53.

'From Spokane, 7-31-1909.
'To Motor 5 at C. D. Alene station.
'Motor 5 will run Spl. C. D. Alene to Spokane; meet Special 4 east at Alan' "?

"Yes."

2. "If you find that plaintiff left Coeur d'Alene in violation of his orders, then answer this question: 'Was that leaving in violation of his orders the proximate cause of the accident' "?

"Yes."

3. "Were the air brakes on Campbell's train immediately before the collision insufficient to enable Campbell to control the speed of the train?"

"Yes."

Where a portion only of the facts are found by the jury, the law conclusively presumes that the jury found all facts not answered by the special interrogatories in favor of the party recovering judgment. It must be remembered that this action was brought under the Federal Employers' Liability Act, Section 3 of which provides:

> "That no such employee who may be injured shall be held guilty of contributory negligence where violation by such common-carrier of any statute contributed to injury of such employee."

Argument is not necessary, that all material facts in the case at bar were not answered by the special findings. An examination of the pleadings shows that there is no special finding, that the failure of the brakes to work immediately prior to the accident did not contribute directly and proximately to the injury; there is no finding that defendant maintained its equipment according to standard imposed by Congress. A great many other questions arising in the case might be suggested upon which there was no special finding. The law presumes that each of these findings were answered by the jury in its general verdict in favor of the plaintiff. Therefore, if it should be held that the finding actu-

ally made as to insufficiency of brakes to control the speed of the train immediately prior to the accident, and the findings presumed are inconsistent with the finding that the leaving of Coeur d'Alene, in violation of his orders by plaintiff, was the proximate cause of the accident, (which inconsistency is assumed for the purpose of argument only), the findings would neutralize each other, and the general verdict must control.

In the case of *Farmers' Savings Bank vs. Burr Forbes & Son,* 132 N. W., 59, (Iowa, 1911), we find this language:

> "There cannot be a judgment upon answers to special interrogatories, unless these answers cover every issue in the case, and, when taken in connection with the pleadings (and possibly with the instructions), are in themselves sufficient to enable the court to determine which party is entitled to the judgment without referring to the testimony. * * * When these (special interrogatories) cover every fact or issue in controversy, the right to recover became purely a question of law. It is then like determining the rights of the parties upon an agreed state of facts, so, where a fact is absolutely essential to recovery, a finding negativing its existence will be conclusive without more. But often the interrogatories do not include all the issues of fact essential to reach a legal conclusion, and then it becomes of the utmost importance to know what extrinsic mat-

ters, if any, may be resorted to in aid of these findings. Every reasonable presumption is to be indulged in favor of the general verdict. All essential facts inhere therein when the contrary is not made to appear from the special findings. So that every question of fact raised during the trial, unless withdrawn from the jury by the Court, is answered, though not specially found in response to some interrogatory."

In the case of *Conwell vs. Tri-City Ry. Co.*, 112 N. W., 546, the Court said:

"On a motion for judgment against a general verdict based on special findings, every issue raised by the pleadings and not eliminated by the instructions will be presumed to have been found for the party in whose favor the general verdict is returned, and it will be presumed that such findings are supported by sufficient evidence; but the special findings cannot be added to or supported by the evidence, and must be given effect only so far as they necessarily negative the findings which might otherwise be assumed in support of the general verdict."

Indianapolis Southern Ry. Co. vs. Tucker, 98 N. E., 431 (Ind., 1912).

"The general verdict finds every material issuable fact in favor of appellee, which includes a finding that appellee received all the injuries alleged in the manner stated in the complaint. * * * It has been held that when the facts found by the jury in answer to interrogatories are such only as to preclude a recovery upon

> one branch of a case, and no facts are found which preclude a recovery upon another branch, it will be presumed that the jury based their verdict upon the branch of the case upon which the answers were not inconsistent with the general verdict."

In *Morrow vs. Bonebrake,* 115 Pac., 585 (Kan., 1911), the Supreme Court of Kansas used this language:

> "The general verdict for appellee imports a finding in her favor upon every material allegation in her petition and every issue in the case not inconsistent with the special findings. 'When the special findings of facts is inconsistent with the general verdict, the former controls the latter.' (Civ. Code, No. 294), but, where a question of consistency arises, nothing is presumed in aid of special findings, while every reasonable presumption is indulged in favor of the general verdict."

In *Seigel, W. & C. Live Stock Com. Co. vs. Johnson,* 44 Pac., 206, the Supreme Court of Oklahoma said:

> "The judgment entered was, as the record shows, rendered 'on the verdict in the case on the issues raised in the attachment proceedings'; and this verdict was a general verdict in favor of the defendants. This verdict was a general finding in favor of the defendants upon all the issues presented to the jury, and it was a general finding in favor of the parties

> for whom the jury found of all the facts necessary to support the verdict."

The Circuit Court of Appeals for the Seventh Circuit, in the case of *Daube vs. Philadelphia & R. Coal & Iron Co.*, 77 Fed., 713, lays down the following rule:

> "In determining the force of a special verdict or finding, only the facts found, unmodified by the statements of counsel or by reference to the evidence, can be considered. The silence of the verdict in respect to a fact is equivalent to an express finding against the party who has the burden of proof."

In order for motion for judgment upon special interrogatories to be granted, the inconsistency between special findings and the general verdict must be irreconcilable.

In *Fishbaugh vs. Spunaugle*, 92 N. W., 58 (Ia.), the following language is used:

> "This court has held that, although there is an apparent inconsistency between some of the special findings and the general verdict, yet if, upon taking them as a whole, such inconsistency is not necessarily to be implied, the general verdict must stand. * * * The question is not to be determined by singling out some one special finding for consideration, but all must be considered together in the light of the pleadings. * * * No mere superficial inconsistency is

sufficient to invalidate the verdict. It must be so irreconciliable that both cannot possibly stand. * * * We have at least gone to the extent of saying that, if there was evidence to sustain the general verdict, it will not be disturbed, though the special finding may not seem to sustain it. * * * The Court will not strain a point to discover an inconsistency between the verdict and the finding, * * * but on the contrary, the finding will, if possible, be so construed as to support the verdict. * * * And all reasonable presumptions will be indulged to support the verdict."

In *Drake vs. Justice Gold Min. Co.*, 75 Pac., 913, (Colo., 1904), the Court said:

"Where a special finding of fact, inconsistent with the general verdict, is so irreconcilable therewith as to be incapable of removal by any evidence admissible under the general issues, the general verdict cannot stand, and judgment entered upon it is improper. Every presumption and intendment, however, is to be indulged in favor of a general verdict, and in ascertaining whether such inconsistency exists recourse may not be had to the evidence actually adduced at the trial, but may be to the issues as made by the pleadings; and if, by any possible competent evidence that might be produced thereunder, the apparent inconsistency can be overcome, it may be disregarded, and the general verdict permitted to stand."

In *Tarsahonsky vs. Illinois Cent. R. Co.*, 117 N. W., 1074, (Iowa, 1908), the Court said:

> "An answer to the interrogatory must be conclusive against the verdict in order to warrant disregarding the latter."

Our own Supreme Court, in the case of *McCorkle vs. Mallory,* 30 Wash., 632, said:

> "Where a special verdict is susceptible of two constructions, one of which will support the general verdict and the other will not, that construction will be given the special verdict which will support the general verdict."

Special findings must be findings of ultimate facts and not mixed questions of law and fact or conclusions, and the Court should disregard any finding which is a conclusion.

In *Fishbaugh vs. Spunaugle,* 92 N. W., 58, the Court in discussing this proposition said:

> "And, where a special finding is more in the nature of a conclusion of law than a finding of fact, it may be disregarded by the court. * * * A question whether transactions by a partner were within the scope of the partnership business was held to involve more of law than of fact, and not a proper subject of special finding by the jury."

In the case of *Lake Shore & M. S. Ry. Co. vs. McIntosh,* 38 N. E., 476 (Ind.), the Supreme Court in discussing an interrogatory, finding that the collision was the proximate cause of the injury, said:

> "So, to the answer of the jury to the interrogatory finding that the collision was the proximate cause of the injury, it may be sufficient to say that this was but a conclusion, and cannot affect the facts found as to all matters connected with the accident. It was for the jury to find the facts showing the condition of the crossing and surroundings, and everything else necessary in relation to the matter in which the injury was brought about; but it was for the court to draw the conclusion as to what one or more of such facts, if any, constituted the proximate cause or causes of the death of the intestate."

The correctness of the rule as to special interrogatories, it seems to us, is fully stated by the Circuit Court in its decision in this case (69), and that the decision of the Circuit Court is amply sustained by the authorities therein cited.

In the light of the foregoing authorities, we submit, that the special findings do not cover *all* facts necessary to support the contention of the defendant; that there is a conclusive presumption that all facts not especially found by the jury were found in favor of the plaintiff; that the facts found, together with the facts presumed to have been found, are not inconsistent with the general verdict, and that the finding that the proximate cause of the collision and injury was the disobedience of orders

is a conclusion, and not a finding of fact, and should be disregarded by the Court.

The doctrine of proximate cause has been discussed by counsel for the Company, and it appears to us that the main reliance of the Company is upon the special finding of the jury in regard to proximate cause, which is not a finding of fact, but a conclusion of the jury, a mixed question of law and fact, and should be disregarded.

Distinction between proximate cause and a cause which proximately contributes to an injury.

It must be remembered that this is an action brought in the Federal Courts, by a citizen of the State of Washington, against a Washington corporation, based upon the Employers' Liability Act, as amended in 1903 (35 Stat., 66), and is not an action based upon the common law, wherein the doctrines of assumption of risk and contributory negligence are applicable. Congress recognizing the injustice to employees of the doctrines of assumption of risk and contributory negligence in cases where common-carriers were engaged in interstate commerce, by enactment, swept them aside and substituted the Employers' Liability Act. That

portion of the Act which is particularly pertinent to the matter now under discussion, is Section 3 of the Act as amended in 1903, as follows:

> "Provided that no such employee who may be injured or killed shall be held to have been guilty of contributory negligence in any sense where the violation by such carrier of any statute enacted for the safety of employees contributed to the injury or death of such employees."

There is a wide distinction between a proximate cause and a cause which proximately contributed to an injury, and this distinction is recognized by Congress in the Employers' Liability Act, and by the Courts in interpreting similar statutes. We call attention to the case of *McFail vs. Barnwell County,* 35 S. E., 562, where this question was squarely presented to the Court. In South Carolina there is a statute providing that any person who shall receive bodily injury to his person through defects of a highway, may recover in an action against the county, the actual damages sustained.

> "Provided such person has not in any way brought about such injury or damage by his own act or negligently contributed thereto."

The Court charged the jury as follows:

> "You will inquire whose negligence caused the injury, and if you are satisfied that plaintiff's negligence was the proximate cause of the injury, the defendant must not be held liable."

Error was predicated on this instruction, and in discussing the proposition, the Supreme Court of South Carolina said:

> "It seems to us that one thing is understood to contribute to a given result when such thing has some share or agency in producing such result, and is not understood to convey the idea that such thing was the efficient cause of such result in the sense that without it, such result would not have occurred."

The case was reversed by reason of the error complained of in the above instruction.

Wragee vs. South Carolina & G. R. Co., 33 L. R. A., 191, is also an instructive case upon this point. There is a statute in South Carolina that if a person is injured by collision with the engines or cars of railroad corporations at a crossing, and it appears that the corporation neglected to give the signals required by statute, and that such negligence contributed to the injury, the corporation shall be liable for all damages caused by the collision, unless

it is shown that the person injured was at the time of the collision guilty of gross or willful negligence, which contributed to the injury.

Defendant requested an instruction that the jury must conclude that the failure to give the required statutory signals was the proximate cause of the injury sustained before they could render a verdict for the plaintiff. This instruction was refused and appeal was predicated on the refusal to give said instruction. The Court in discussing the statute said:

> "Now it will be observed that there is nothing in the language found in this section calculated to convey the idea that the legislature intended to make the liability of the railroad company dependent upon the fact that the neglect to give the statutory signals was the proximate cause of the injury complained of; and, on the contrary, the language used implies no such intention. All that the statute requires is that the neglect to give the prescribed signals shall contribute to the injury, which, in our judgment, is a very different thing from saying that such neglect must be the proximate cause of the injury."

It is a well settled rule of law, that there can be a proximate cause and a contributing cause to an injury, and that two or more acts of negligence may proximately contribute to the same injury.

In *Chicago & N. W. Ry. Co. vs. Prescott*, 59 Fed., 237 (C. C. A.), we find this language used:

> "With respect to the suggestion that the injuries complained of were immediately occasioned by the sudden shying of the horse, which plaintiff was driving, it is only necessary to say that the shying of the horse cannot be regarded as the sole proximate cause of the injury. The obstruction which had been placed in the highway directly contributed to the accident, and the jury was justified in so finding."

To the same effect see:

Andrew vs. Railroad Co., 42 N. W., 513.
Skjeggerud vs. Ry. Co., 35 N. W., 572.
Corey vs. Railroad Co., 21 N. W., 479.

The Supreme Court of the United States in *Choctaw, Oklahoma & Gulf R. R. Co. vs. Holloway*, 191 U. S., 334, recognized this distinction. The ground of negligence relied on was failure of defendant to equip its engine with shoe brakes. The tender and other cars were equipped with air brakes; plaintiff discovered a horse on the track and applied his air; the brakes on the tender and train were successfully applied, but by reason of the absence of shoe brakes on the engine, the brakes thereon could not be worked. The effect of applying air brakes on the train was to stop the tender

and car and the engine was forced with great momentum against the tank. In attempting to escape, plaintiff was injured. The defendant urged that the proximate cause of injury was not the absence of brakes, but the presence of the horse on the track. In discussing this proposition the Court said:

> "We think one proximate cause of the accident was the absence of the engine brakes. The purpose of a brake is to stop the engine more promptly than can be done without it, and if there had been a brake on the engine it would if used, have probably prevented the accident. At any rate, there was evidence to that effect. The absence of a brake which, if present, would have prevented the accident, was, therefore, a proximate cause thereof. If an obstacle on the track which necessitates the using of the brake is to be regarded as the sole proximate cause of an accident which occurs only because there was no brake on the engine, the result would be that the company would never be liable, no matter what its negilgence in not providing effective brakes, so long as its own negligence did not cause the presence of the obstacle on the track. This cannot be true."

Defense of assumption of risk and contributory negligence not available to Company under the Act of Congress.

In its opinion in the case at bar, the Circuit Court of Appeals referred to the case of *Grand*

Trunk Western Ry. Co. vs. Lindsay, 201 Fed., 836-844, and approved of what was said by the Circuit Court of Appeals in that case. After the case at bar was heard in the Circuit Court, this Court on writ of error to the Circuit Court of Appeals, affirmed the Circuit Court in the Grand Trunk case, and in its decision went even farther than the court below, and it seems to us *this case is final and conclusive as to all the questions involved in the case at bar.* In the Grand Trunk case this Court says:

> "But having regard to the state of the proof as to the defect in the coupling mechanism, its failure to automaticaly work by impact, after several efforts to bring about that result, all of which preceded the act of the switchman in going between the cars, in the view most favorable to the railroad, the case was one of concurring negligence; that is, was one where the injury complained of was caused both by the failure of the railway company to comply with the safety appliance act and by the contributing negligence of the switchman in going between the cars. Under this condition of things it is manifest that the charge of the court was greatly more favorable to the defendant company than was authorized by the statute for the following reasons: Although by the 3rd section of the Employers' Liability Act a recovery is not prevented in a case of contributory negligence, since the statute substitutes for it a system of comparative negligence, whereby the damages are to be diminished in the pro-

portion which his negligence bears to the combined negligence of himself and the carrier,—in other words, the carrier is to be exonerated from a proportional part of the damages corresponding to the amount of negligence attributable to the employee (*Norfolk & W. R. Co. vs Earnest,* 229 U. S., 114, 122; 57 L. Ed. 1096, 1101; 33 Sup. Ct. Rep., 654),—nevertheless under the terms of a proviso to the section, contributory negligence on the part of the employee does not operate even to diminish the recovery where the injury has been occasioned in part by the failure of the carrier to comply with the exactions of an act of Congress enacted to promote the safety of employees, In that contingency the statute abolishes the defense of contributory negligence, not only as a bar to recovery but for all purposes.

"The only other objection pressed in the argument at bar concerns an instruction asked and refused by the trial court with reference to the weight to be attributed to the testimony of a car inspector who inspected the coupler in question before the accident. The subject of this asserted error was evidently carefully considered by the trial court and was adversely disposed of by the court below both in its original and in the opinion on the rehearing. Under these circumstances, without going into detail, in view of the doctrine to be applied to cases of this character as announced in *Chicago Junction R. Co. vs. King,* 222 U. S., 222, 56 L. ed., 173, 32 Sup. Ct. Rep., 79; *Chicago, R. I. & P. R. Co. vs. Brown,* 229 U. S., 317, 57 L. ed. 1204, 33 Sup. Ct. Rep., 840, 3 N. C. C. A., 826, we are of the opinion that we need do no more than say that after a careful examination of

the subject, we are of the opinion that no reversible error was committed by the court below, and its judgment is therefore affirmed." 233 U. S., 42.

The case of *Louisville & N. E. Co. vs. Wene,* 202 Fed., 887 (C. C. A. 7th Circuit), involves a construction of Section 3 of the Employers' Liability Act. Plaintiff's intestate was a conductor on freight No. 72. No. 72 was standing on a sidetrack and was run into on the sidetrack by passenger No. 52. It was the duty of the conductor on No. 72 to close the switch after his train had gone upon the sidetrack, and this he failed to do. No. 52 ran past the switch light at the end of the switch and off of the main track onto the sidetrack and collided with the rear end of No. 72. In this collision the plaintiff's intestate was killed. It was conceded that plaintiff's intestate was negligent, and the defendant requested instructions that the failure of the conductor to close the switch was the proximate cause of the injury, and that no recovery could be had. This instruction was refused.

It seems to us that the learned trial judge in this case has succinctly explained the true meaning and intent of Congress, as shown by section 3 of the

Employers' Liability Act in his opinion denying the motion for judgment non obstante.

> "Can it be said as a matter of law that the special finding, that the disobedience of orders on the part of the plaintiff was the proximate cause of the accident defeats a recovery under the Employers' Liability Act? I am of the opinion that it cannot. The air brakes and other equipment required by the Safety Appliance Act are for use in an emergency, whether that emergency arises from unavoidable accident or from neglect. A collision does not of necessity result from disobedience of orders on the part of an employee, and if the employee who has been guilty of such disobedience is unable to avoid an impending collision because of defective equipment furnished by the master, it surely cannot be said that the defective equipment in nowise contributed to the accident. If it did contribute a liability exists under the act in question." (Transcript of Record, C. C. A., p. 31).

We deem it useless to enter upon an extensive discussion of the subject of proximate cause. No general rule can be laid down which is applicable to all cases, because each case must depend primarily upon its particular facts, and because proximate cause and a cause contributing proximately to an injury shade into each other. We shall, however, cite two cases, which on fact and principle, we believe will shed light upon the issues in the case at bar.

Deming vs. Merchants' Cotton Press & Storage Co., 13 L. R. A., 518 (Tenn.), is particularly instructive. In this case cotton was stored in the compress of the defendant and was destroyed by fire. Twenty-nine bales were standing on the track in loaded cars at the compress. The twenty-nine bales were scheduled to depart at seven o'clock. There was a delay in the time of starting of about seven to ten minutes, caused by the breaking of a drawbar, and the cotton in the cars was destroyed by fire. The Court had previously held, that the Compress Company was not liable by reason of any negligence for the fire. The question was therefore squarely presented to the Court, whether the proximate cause of the loss of the twenty-nine bales of cotton was caused by the burning of the compress or the breaking of the drawbar.

> "It is insisted here, in support of the finding, that neither the delay nor the breakage of the train, but the fire, was the proximate cause of the loss. In this we do not concur. Granting that the slight delay would not of itself have made the company liable, here we have, in addition, the breaking of the train machinery when the effort is made to remove the cotton, but for which it might have been saved notwithstanding the fire. This, we think, was, therefore, the proximate cause of the loss. * * * It is true that the fire destroyed cotton, and

> in that sense caused the loss, but it appears that, notwithstanding the occurrence of the fire, the cotton would not have been burned had not the breaking of the train while it was being removed happened, so that but for this fact the cotton would have been saved. This must therefore be held to be the proximate cause of the loss, and, if it was the result of negligence, the carrier must answer for it."

The case of *Atchison, T. & S. R. Co. vs. Calhoon*, 213 U. S., 1, is also somewhat similar to the case at bar. Plaintiff, who was about three years of age, was a passenger upon a train of defendant and was bound for Edmond. The trainmen did not announce the arrival of the train at Edmond, and after the train had started from Edmond, the mother handed her son to a passenger, who in turn handed the boy to a party on the station platform. This party, with the child in his arms, ran along the side of the moving car and attempted to return the child to its mother. In doing so he stumbled over a baggage truck standing on the platform, and the child fell under the car and was injured. The question involved was, what was the proximate cause of the child's injury. The Court in discussing this proposition used this language:

> "In this case undoubtedly the plaintiff's injury was traceable to the original negligence,

> in the sense that it would not have occurred if the plaintiff had not been separated from his mother. Nevertheless, that negligence may not be the cause of the injury, in the meaning which the law attributes to the word 'cause' when used in this connection. The law, in its practical administration, in cases of this kind regards only proximate or immediate, and not remote, causes, and, in ascertaining which is proximate and which remote refuses to indulge in metaphysical niceties. Where, in the sequence of events between the original default and the final mischief an entirely independent and unrelated cause intervenes, and is of itself sufficient to stand as the cause of the mischief, the second cause is ordinarily regarded as the proximate cause and the other as the remote cause."

The finding therefore that disobedience of orders was the proximate cause of the injury does not negative the implied finding that the failure of brakes to work immediately prior to the collision was a cause contributing to the injury.

For the purpose of this brief, and for no other purpose, we will, for the sake of this argument, concede that Campbell's orders read that Special 5 should meet Special 4 at Alan, and that he misread his orders. The record, however, as disclosed by the Court below, but which record is closed to this Court for consideration herein, is to the effect that

there was a conflict of testimony on the question as to the order. It is not necessary to read the record to be convinced of the fact that Campbell at least believed, at the time he left Coeur d'Alene, that his orders read that Special 5 should meet Regular No. 20 at Alan. Any other conclusion would lead to the belief that Campbell was endeavoring to commit suicide and cause injury to the passengers carried on his train. This view of the situation, of course, cannot be seriously considered and we think we may safely say that if Campbell's orders did not read that Special 5 should meet Special 4 at Alan, that Campbell at least thought his orders so read and that he misread his orders, whatever they were.

Under the Safety Appliance Act, an absolute duty rests on a carrier, not only to equip its trains with brakes, but also to maintain the equipment in accordance with standard set by Congress.

St. Louis I. M. & S. R. Co. vs. Taylor, 210 U. S., 281.
Delk vs. St. Louis, S. F. R. Co., 220 U. S., 580.
Chicago, B. & Q. R. Co. vs. U. S., 220 U. S., 559.
Donegan vs. Baltimore & N. Y. Ry. Co., 165 Fed., 869 (C. C. A.).

Atlantic Coast Line R. Co. vs. U. S., 168 Fed. 175.
U. S. vs. Atchison, T. & S. F. R. Co., 163 Fed. 517 (C. C. A.).
U. S. vs. Denver & R. G. Co., 163 Fed., 519 (C. C. A.).
Chicago, M. & St. P. Ry. Co. vs. U. S., 165 Fed., 423 (C. C. A.).
U. S. vs. Wheeling & L. E. K. Co., 167 Fed., 198.
Indiana Union Traction Co. vs. Abrahams, 101 N. E., 1.

Failure to perform statutory duty is negligence per se.

The only question remaining to be discussed is the sufficiency of the testimony in regard to the insufficiency of the brakes to control the speed of the train immediately prior to the accident. There is no dispute that Campbell was a competent employee. In fact, the whole record shows that he was regarded by his employers as their best motorman—he had run the Shoshone Special, the "crack train" on the road for over a year prior to the accident. On the 31st of July, 1909, Campbell left Coeur d'Alene at about 4:30 p. m. on his return trip to Spokane. When about one and one-half miles from Coeur d'Alene he observed Regular 20 on the same track approaching from the opposite direction. Campbell testified that he observed No.

20 when it was about 800 feet distant; that he immediately applied the emergency brakes; that the air took hold and then began to leak off, and he was unable to stop the train. (18-19).

In this he is corroborated by the testimony of Dixon, a locomotive fireman, an employee of the Northwestern Railway Company for four years, who was familiar with air brakes and had himself stopped trains with the emergency brake. Dixon says that the trains were about 200 yards apart when Campbell applied the emergency; that it held for a few seconds and then leaked off. (28).

Each of these witnesses is corroborated by Beck, a brakeman and conductor, for seventeen years in the employ of the Northwestern Railway Company, who was standing in the open door of the cab about four feet from Campbell, talking to Dixon, and each of them had an unobstructed view of the track ahead. (28-29).

The testimony of Trudell, brakeman on Special No. 5, also corroborates the uncontradicted testimony of Dixon, Beck and Campbell in regard to the place where the emergency was applied. Trudell said that he felt the air set unusually hard—so hard

he wanted to see what was the matter; that he went to the rear door of the car, through the crowd standing in the aisles and on the platform and got off before the collision, and that it took him about fifteen or twenty seconds to get [illegible] (26).

The testimony of numerous witnesses was to the effect that No. 5 was running from thirty to thirty-five miles an hour. Conceding that thirty miles an hour was the true rate of speed, No. 5 would have been running about 44 feet a second, and would have run, according to Trudell, from 660 to 880 feet after the brakes were set, which corroborates the testimony of Campbell, Dixon and Beck.

As opposed to this uncontradicted testimony, defendant called a number of passengers as witnesses, whose testimony was of a negative character. They all testified that they felt the brakes applied and the crash followed almost immediately.

None of these witnesses were in a position to observe the track ahead of the moving train, as were all of the witnesses for the plaintiff. Their testimony therefore is of a very unsatisfactory quality, and does not in any sense contradict the positive unimpeached testimony of the witnesses Beck, Dix-

on and Trudell. The trial judge, in his opinion in passing upon the motion for new trial, said:

> "They had little to guide them in forming an opinion except the mere lapse of time between the application of the brakes and the ensuing collision and this is admittedly a very unsafe and uncertain guide in a crowded train where nothing out of the ordinary is expected or anticipated." (Trans. of Record, C. C. A., p. 41).

We therefore submit that the jury were warranted in finding, from the testimony as a whole, that Campbell properly applied his air when from 600 to 800 feet from the place where the collision occurred, and that the brakes in his train refused to work.

It is conceded by the pleadings that the brakes on Special No. 5 should have stopped the train within 300 feet if they had been in proper working order. The testimony of Campbell, Dixon, Beck and Delaney, all railroad men, and of Henry J. Robinson, the Westinghouse expert, called by the defendant, all was to the effect that the train could have been stopped in between 200 or 300 feet, if the brakes had been in proper working order.

The question therefore naturally arises, why was the train not stopped and the collision averted.

Counsel for the Company ingeniously argues that the defendant is not liable, because Campbell testified that a number of different things might have prevented the brakes from working properly. He forgets, however, that Campbell testified positively that he did not release the brakes after the emergency was set.

He also forgets the testimony of Dixon, the locomotive fireman, who said the brakes "leaked off." There is no testimony that the brakes released suddenly, as if released by the motorman, but the testimony of all of the witnesses is that the brakes held for a few seconds and then gradually released. If Campbell had released his air, the brakes would not have leaked off, but would have released suddenly.

Counsel also forgets the testimony of Dixon, that he knows how air brakes work when they are in proper condition, and that the brakes of No. 5 did not work as if they were in proper condition.

Does counsel contend that plaintiff must show by the brakes themselves, that they were defective, or that the defects therein may not be shown by circumstantial evidence? *It is uniformly held under*

labor laws, that failure to perform statutory duty is negligence per se.

Cummings vs. Kinney, 89 N. Y. Sup., 579, is a case in which this question was before the court in regard to the labor laws of the State of New York. The labor laws of New York provide, that persons employing or directing any kind of erection shall not furnish for the performance of labor any unsafe ladders, etc. Plaintiff was a hodcarrier, and while using one of the ladders furnished by the defendant one of the rounds broke. It was held under the above mentioned section, that the breaking of the ladder round raised a presumption of negligence entitling plaintiff to go to the jury. *Madden vs. Hughes,* 93 N. Y. Sup., 324, was also a case where a labor law was interpreted. In that case the court held, that the unexplained breaking of a plank on which a servant is working was sufficient to warrant the submission to the jury the question of the question of the master's negligence under a labor law, requiring masters to furnish safe scaffolding or other mechanical contrivances. In the same case the Court used this language, which has also been applied to the Safety Appliance Act:

> "The purpose of the statute was to impose an absolute duty on the master, which cannot be delegated."

In the case of *Grand Trunk Western Ry. Co. vs. Lindsay,* 201 Fed., 836 (C. C. A.), discussing the Safety Appliance Act, the Court said:

> "It was negligence per se for the defendant to use the car having defective couplers, even though the shoving of the cars together was accidental." 233 U. S., 42.

The learned trial judge, in the case at bar has clearly stated the duty resting on the carrier under the Safety Appliance Act.

> "It is almost universally held that the violation of a statutory duty is negligence per se and if it be such it must be negligence on the part of those officers, agents or employees who are charged with the duty of complying with the statutory requirements. * * * The use, therefore, by the defendant company of an electric motor not equipped with a power drive wheel brake so that the motorman driving the train could control its speed was negligence per se upon the part of its representatives charged with the duty of meeting the statutory obligation." (Transcript of Record C. C. A., 43).

Indiana Union Traction Co. vs. Abrahams, 101 N. E., 1, (Ind., 1913), is a case where practically the same facts were involved as in the case at bar. We

shall refer to this case later in our brief, but call attention at this time only to the following portion of said opinion:

> "The happening of the accident, under the facts found by the jury was prima facie evidence of appellant's negligence, which imposed upon it to show some excuse for the prima facie duty on its part."

In the case of *Waverly Co. vs. Beck,* 103 N. E., 332 (Ind., 1913), the Court held:

> "That a violation of the Factory Act, prohibiting any persons from employing any young person between the ages of fourteen and eighteen years to operate any elevator, constitutes negligence per se, and contribtuory negligence was not a defense."

In *Gallenkamp vs. Garvin Machinery Co.,* 99 N. E., 718 (N. Y.), the Court held:

> "That the employment of a child under fourteen years of age, in a factory in violation of labor laws is evidence of negligence on the part of the employer, and will justify recovery for injuries sustained."

In *Pinnell vs. Kelly,* 99 N. E., 772, the Supreme Court of Indiana held:

> "That failure to guard a shafting and pulleys thereon was negligence per se where the statute provides that all vans, planers, and

machinery of every description in factories should be guarded."

The Supreme Court of the United States in a long line of decisions has held, that the duty resting upon a common carrier by railroad, engaged in interstate commerce, to equip its trains with sufficient air brakes and with automatic couplers is an absolute duty, and that the requirement of the statute is not satisfied by using reasonable care to see that the equipment furnished is in perfect condition.

There are two reasons why Congress has placed an absolute unqualified duty upon the common carrier: First, the protection of the lives of passengers and employees, by requiring the exercise of a higher degree of supervision by the carrier; and second, a legislative policy which deems it is just that the carrier should be liable for injuries to employees while in its service, on the theory that the added expense should be charged as a part of the maintenance and operation of the carrier.

We cite the case of *Chicago, B. & Q. R. Co. vs. U. S.*, 220 U. S., 559, as a case in which there is an able discussion of the Liability Act, and the degree of care necessary to be exercised by the carrier. In this case the Court said:

"Does the act of Congress in question impose on an interstate carrier an absolute duty to see to it that no car is hauled or permitted to be hauled or used on its line unless it be equipped with couplers coupling automatically by impact, and which can be uncoupled without the necessity of men going between the ends of the cars? Can the carrier engaged in moving interstate traffic escape the penalty prescribed for a violation of the act, in the particulars just mentioned by showing that it had exercised reasonable care in equipping its cars with the required couplers, and had used due diligence to, ascertain, from time to time whether such cars were properly equipped?

* * * * * * * *

"The Congress, not satisfied with the common-law duty and its resulting liability, has prescribed and defined the duty by statute. We have nothing to do but to ascertain and declare the meaning of a few simple words in which the duty is described. It is enacted that 'no cars, either loaded or unloaded, shall be used in interstate traffic which do not comply with the standard.' There is no escape from the meaning of these words. Explanation cannot clarify them, and ought not to be employed to confuse them or lessen their significance. The obvious purpose of the legislature was to supplant the qualified duty of the common law with an absolute duty deemed by it more just. If the railroad does, in point of fact, use cars which do not comply with the standard, it violates the plain prohibitions of the law and there arises from that violation the liability to make compensation to one who is injured by it."

In the case of *Delk vs. St. Louis & S. F. R. Co.*, 220 U. S., 580, this Court, speaking by Justice Harlan, said:

> "The circuit court of appeals, in its opinion, said that the trial court gave the law to the jury by stating the language of the statute, but in such a way as to lead the jury to suppose that the statute imposed an absolute duty on the carrier to keep its cars in good order at all times. An order was therefore made reversing the judgment of the circuit court, and directing the case be sent back for a new trial. But this court granted a writ or certiorari, and the case is here primarily for the review of the judgment of the circuit court of appeals.
>
> "The construction of the statute, adopted by a majority of the circuit court of appeals, to the effect that the act did not impose upon the carrier an absolute duty to provide and keep proper couplers at all times and under all circumstances, but was bound only to the extent of its best endeavor to meet the requirements of the statute, has been rejected by this court in *Chicago, B. & Q. R. Co. vs. United States*, just decided, and on the authority of that case, we hold that the circuit court of appeals erred in the particular mentioned."

The case of *St. Louis, I. M. & S. R. Co. vs. Taylor*, 210 U. S., 281, is a leading case upon this question. Justice Moody in speaking for the Court said:

> "We need not enter into the wilderness of cases upon the common-law duty of the em-

ployer to use reasonable care to furnish his employee reasonably safe tools, machinery and appliances, or consider when and how far that duty may be performed by delegating it to suitable persons for whose default the employer is not responsible. In the case before us the liability of the defendant does not grow out of the common-law duty of master to servant. The Congress, not satisfied with the common-law duty and its resulting liability, has prescribed and defined the duty by statute. We have nothing to do but to ascertain and declare the meaning of a few simple words in which the duty is described. It is enacted that 'no cars, either loaded or unloaded, shall be used in interstate traffic which do not comply with the standard.' There is no escape from the meaning of these words. Explanation cannot clarify them, and ought not to be employed to confuse them or lessen their significance. The obvious purpose of the legislature was to supplant the qualified duty of the common law with an absolute duty, deemed by it more just. If the railroad does, in point of fact, use cars which do not comply with the standard, it violated the plain prohibitions of the law, and there arises from that violation the liability to make compensation to one who is injured by it."

The case of *Indiana Union Traction Co. vs. Abrams,* 101 N. E., 1 (Ind., 1913), is very similar to the case at bar. In Indiana there is a statute modeled after the Federal Employers' Liability Act applicable to interurban electric trains doing interstate business. The statute provides:

"That it shall be unlawful for any common-carrier in this state operating an interurban railway by electric power to operate or run upon any railroad in this state any motor car used in regular interurban passenger traffic which is not equipped with an approved power air brake, in good condition, and subject to the control and operation of the motorman in charge of such car, and of sufficient capacity to control the speed of the car." Section 14 of the act (Section 5291, Burns' Stat. 1908) contains the following provisions: 'That any employe of any such common-carrier, who may be * * * injured by any * * * car * * * in use contrary to the provisions of this act * * * shall not be deemed thereby to have assumed the risk thereby occasioned * * * nor shall any such employe be held as having contributed to his injury, in any case where the carrier shall have violated any of the provisions of this act. * * *"

The facts in this case are as follows: Plaintiff was motorman on a passenger train and was injured in a collision with a freight car. The passenger car had right-of-way over the freight car, and under the rules of the road the freight cars should have stopped at a siding. When plaintiff first saw the freight car he was 650 to 700 feet from the place of the accident. Plaintiff's car was running twenty-five miles per hour and the freight car was running about thirty-five miles per hour. Plaintiff attempted to apply his brakes as soon as he observed the freight car, but the car traveled 150 or 200 feet

before the brakes took hold. At the time of the accident the freight car had almost stopped. The passenger car, if equipped with standard brakes in good condition, could have been stopped in from 350 to 400 feet. The braking equipment was carefully tested the day before the accident, and when delivered to the plaintiff the brakes were in apparently good condition, and under ordinary circumstances were of sufficient capacity to control the speed of the car. The brakes were not worn or weak and apparently not broken. The jury found that the brakes were procured from manufacturers of recognized standing as manufacturers of power air brakes. The Court in discussing the law applicable to the facts, said:

> "Appellee claims that the statute imposed on appellant the absolute duty to equip the car according to the provisions of the act, and this duty was not discharged by showing that the car was equipped with an approved air brake, in 'apparent' good condition, not 'apparently' broken, and of sufficient capacity to control the car 'under ordinary conditions'; that appellant's lack of actual knowledge of the defect in the brake and the exercise of ordinary care in equipment and inspection do not meet the requirements of the act. The statute in question is similar to Act Cong. March 2, 1893, c. 27 Stat. 531 (U. S. Comp. St. 1901, p. 3174),

which rendered it unlawful for any carrier engaged in moving interstate traffic by railroad to use on its line any locomotive engine not equipped with a power driving wheel brake and appliances for operating the train brake system, or to run any train in such traffic that had not a sufficient number of cars in it so equipped with power or train brakes that the engineer on the locomotive drawing such train can control its speed. * * * Mr. Justice Harlan delivered the opinion of the court, and it deals with the questions here in controversy as to the construction of the statute. It was held that the duty of the carrier is an absolute one, which is not met by the exercise of reasonable care and diligence in equipment and inspection. In enacting our statute, evidently modeled after the act of Congress it cannot be doubted that the legislature was not satisfied with the duty and liability of carriers to their servants, as defined by common-law rules, and by this act of 1907 it intended that such duty and liability should be measured by a stricter rule. This rule is set out in the act in language so plain as to practically foreclose discussion as to the legislative intent. We think the duty prescribed by the act of 1907 is absolute, and it is not discharged by proof of the use of ordinary care in equipment and inspection. * * *

"The complaint alleges that the brake was not in good condition, and was not of sufficient capacity to control the speed of the car. The statute requires both qualities. The duty exacted to equip with power air brakes in good condition is not performed in supplying a brake in a condition which was good in appearance only. * * * Neither is the demand of the

statute satisfied by equipment with a brake of sufficient capacity to control the speed of the car 'under ordinary conditions.' It must have been contemplated by the legislature in enacting the statute that extraordinary conditions might arise, as did here, when the only means of safety to passengers and employes would lie in the quick control of the car's speed by the application of the air brake. The title of the act (Acts 1907, p. 186) recites that it is 'An Act to promote the safety of employes and travelers,' etc. To hold that equipment, sufficient only for ordinary conditions, fulfills the statutory requirement, would be the subversion of the plain intent of the enactment. * * * The happening of the accident under the facts found by the jury was prima facie evidence of appellant's negligence, which imposed on it the obligation to show some excuse for the prima facie failure of duty on its part. *Terre Haute, etc. R. Co. vs. Sheeks* (1900), 155 Ind., 74, 56 N. E., 434. No such excuse is shown by the findings. The facts specially found do not contradict the general verdict in its findings that appellee's injury was proximately caused by appellant's failure to equip the car with an air brake in good condition, or of sufficient capacity to control the speed of the car."

Indiana U. T. Co. vs. Abrahams, 101 N. E., 1.

We have quoted at length from this decision because the facts and the statute of Indiana, upon which the action is based, are practically identical with the facts in the case at bar. So far as we have been able to find this case is more nearly in point

than any other decision, and it seems to us that the law as set forth by the Indiana Court is based both upon reason and a fair interpretation of the statute.

It is conclusively shown by the record that the brakes on Campbell's train were not sufficient to control the speed thereof immediately prior to the accident, and were so defective as to prevent their performing the duty for which they were intended. One purpose of Congress in enacting the Safety Appliance Act was undoubtedly to meet just such emergencies as in the case at bar. Congress recognized that orders are liable to be misinterpreted, that human beings are not infallible, and has imposed upon the common carriers, engaged in interstate commerce, *the absolute duty not only to equip their trains with air brakes sufficient to control the speed thereof under ordinary circumstances, but also to equip with brakes which will perform their services in emergencies*, similar to those in this case. A failure so to do on the part of defendant was a violation of the Safety Appliance Act, and the defendant is liable in damages to the plaintiff for the injuries received.

Campbell in Course of his Employment and Duty to provide Air Brakes owed to him.

Counsel for the Company admits if the Employers' Liability Act and Safety Appliance Act apply to electric railway trains, that then it is the absolute duty of the Company to supply its trains with air brakes sufficient to enable its motormen to control the movements of the company's trains at all times. It is urged that at the time the accident in question occurred, the company owed no duty to Campbell because they claim he was acting without the scope of his employment, when he departed from Coeur d'Alene with his train in disobedience of orders, and that the moment he disobeyed his orders by leaving the terminal, he became a trespasser and assumed all the risks incident to the failure of the Company to comply with the statute. The Company assumes in its brief that Campbell left the terminal station in violation of his orders. This we do not concede. We have attempted to show in this brief that the special interrogatory with reference to his leaving Coeur d'Alene cannot be considered, and we believe in this we are correct. The question as to Campbel's leaving Coeur d'Alene and the nature of his orders is, therefore, to be de-

termined by the record, upon which there is a conflict, and upon which the jury by its general verdict, has passed. The trial court and the court below also passed upon this same question, so it occurs to us that counsel's argument along the line of Campbell not being in the course of his employment when injured, and that no duty to provide air brakes was owed to Campbell, is without merit. We strenuously contend, therefore, that this court cannot say that Campbell was acting without the scope of his authority, but for the purpose of argument, and for that purpose only, we will assume that Campbell did disobey his orders, and see what incongruous results would follow if the position of counsel for the Company should be sustained. In the first place, we may say that this is but another way of contending that Campbell is barred from recovery in this case because of his contributory negligence. In fact, counsel has attempted to anticipate our argument in this respect, and very candidly admits that if in its ultimate analysis, the principle relied upon be found to be no more than contributory negligence, then his position is perhaps unsound. The cases cited by the Company in support of its argument that Campbell was acting

without the scope of his authority and employment, are, it seems to us, not in point. The facts in each case cited are so dissimilar to the facts in the case at bar, that we fail to see how they can be cited as authority herein. In all these cases cited by the Company, it clearly appears from the facts, that the complaining party at the time of the injuries complained of, had voluntarily stepped aside entirely from the line of his duty, and was doing an act which he was not required to do, or was doing something for his own pleasure and benefit, or was doing some act which he had been especially forbidden to do. In the case at bar, it was Campbell's duty to operate his train from Coeur d'Alene to Spokane, and he had received orders directing him to perform that duty. He states that he also received orders from his superior officer, the conductor on his train, to "pull out." In obedience to his orders, whatever they were, he did leave Coeur d'Alene and proceeded on his way to Spokane, to a point where the accident occurred. He was a recognized employee of the Company in control of one of its trains, and as such, was acting under orders given him by his superiors. If he violated those orders, as counsel argues, his status as an employee

would not be instantly changed from that of employee to a trespasser. If such were the case, the entire force of the statute under which this case is brought, would be annulled, and the very evils which the statute intended to correct, would continue. There would seldom arise a case where it would not be possible for the Company to successfully contend that the employee had violated some order, rule or regulation of the Company, and had, therefore, ceased to be such employee, and had assumed the risk of the Company's non compliance with the statute in question.

An illustration of the inapplicability of the cases cited by counsel is that of the case of *St. Louis & San Francisco Ry. Co. vs. Conarty,* 238 U. S., 243. In that case, the Court says:

> "The deceased and his companions, with the switch engine, were on their way to do some switching at a point some distance beyond the car, and were not intending and did not attempt to couple it to the engine, or to handle it in any way. Its movement was in the hands of others. * * * The principal question in the case is, whether at the time he was injured, the deceased was within the class of persons for whose benefit the Safety Appliance Acts required that the car be equipped with automatic couplers, and draw bars of

> standard height, or putting it in another way, whether his injury was within the evil against which the provisions for such appliances are directed. It is not claimed nor could it be under the evidence, that the collision was proximately attributable to a violation of those provisions, but only that had they been complied with, it would not have resulted in the injury to the deceased."

In the above case, Conarty was simply riding upon the footboard of the switch engine, not operated by the deceased, or under his care or control. He was not coupling the cars or attempting to do so, and it was no part of his duty or employment so to do. He had no connection whatever with the train in question, and we fail to see how this case and similar cases cited by counsel are applicable to the facts in the case at bar.

The provisions of the statute for the application of the rule of comparative negligence, would be abrogated, and the absolute duty imposed upon the carrier to equip its trains with proper air brakes in working condition, would be without force or effect, because the doctrine of assumption of risk could always be interposed, if the Company's contention is correct. It has been said by this court in numerous decisions, that the Employers' Liability Act and the Safety Appliance Act are in their na-

ture, remedial statutes, passed by Congress for the purpose of remedying certain recognized wrongs that existed at common law, and for the purpose of giving to employees of interstate carriers, and the travelling public, new rights and remedies. Congress realized that accidents continually occur, and that railroads were constantly running their interstate lines without taking the necessary precautions to install safety appliances then at their command, for the protection of their employees and the travelling public; therefore, a positive duty was imposed by statute upon all interstate carriers to equip their trains with power brakes, so as to enable the engine man or person in control of the motive power, to control his train at all times from his cab. The penalty imposed upon the carrier for its failure to supply its interstate trains with these safety appliances is, that in all cases, where the absence of such appliances contribute to the injury received by employees, in such cases, the defense of the assumption of risk and contributory negligence are abrogated. The defense of contributory negligence is superceded by the more just and equitable defense of comparative negligence.

If an employee has perchance misconstrued or

misinterpreted an order or rule, and as a result thereof, he is injured, or a wreck or collision occurs, which injury, wreck or collision, however, might have been averted, and in all reasonable probability, would not have happened had the railroad complied with the requirements of the statute and furnished its trains with proper air brakes, the only logical application of the statute is that the doctrine of comparative negligence will be applied, and the railroad company cannot defend an action brought by the employee on the ground that the employee had by his alleged violation of orders, assumed the risk of its violation of the statute. If such interpretation be placed upon the statute in its application to such a state of facts then the entire force and effect of the statute is nullified, and the wrongs which it was intended by Congress to correct, remain.

Conceding for the purpose of argument, that Campbell misread his orders, or that he was not directed by his conductor to "pull out," then it must appear from all his actions on this occasion, that he honestly believed he was performing his duty in the furtherance of the master's work in driving his train from Coeur d'Alene. The human mind is not

infallible. Men are affected by times and conditions and there is no man, however accurate his mind may work, but has not at some time in life, misread, misunderstood or misinterpreted writings, orders and directions for the conduct of the most important affairs of life. Can it be said Congress in passing these statutes did not take into consideration the fact that men are human and are liable to misread and misinterpret orders, and that in just such unforseen emergencies, safety appliances must be at hand, for the protection of the lives of these same employees and lives of the passengers entrusted to their care? If the employee has been negligent, then his damages are to be decreased according to the degree of his negligence, but he is not entirely deprived of his right to have the jury compare his negligence with the negligence of the master in his failure to furnish proper appliances.

Grand Trunk vs. Lindsay, 233 U. S., 42; *Louisville & Nashville R. R. vs. Wene,* 202 Fed., 887.

Error is assigned by the Company on the refusal of the trial court to give two certain instructions

requested by the Company, and because of the giving of certain other instructions.

In view of the decisions cited herein, it occurs to us that the court properly refused to give the instructions requested, and that no error was committed by the giving of the other instructions complained of. In order that this assignment of the Company may be properly considered, reference is made to the instructions given by the Court (pages 53-54-55). It will not suffice to rely upon the giving or refusal to give a part of an instruction or a disconnected instruction. As a matter of fact, the instructions complained of were given by the trial court in other words, and the court even went further in its instructions to the jury than requested by counsel in his instructions, upon the refusal of which he predicates error. The court's instructions, as a whole, were more favorable to the Company than is permissible, as was the case in *Grand Trunk vs. Lindsay.*

In conclusion, we respectfully submit that the Federal Employers' Liability Act and the Safety Appliance Act as amended in 1903, are applicable to the defendant railway company; that the evi-

dence shows that the failure of the brakes to work contributed to the injury complained of, and that the verdict of the jury is supported both by law and the evidence, and for these reasons, we respectfully submit that the judgment of the lower court should be affirmed.

H. LOWNDES MAURY,
Attorney for Defendant in Error.

E. H. BELDEN,
W. C. LOSEY,
H. R. NEWTON,
Of Counsel.